No. 04-446

In the Supreme Court of the United States

ANN VENEMAN, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., PETITIONERS

v.

JOSEPH S. COCHRAN AND BRENDA S. COCHRAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-2522

JOSEPH S. COCHRAN; BRENDA S. COCHRAN,
APPELLANTS

v.

ANN VENEMAN, SECRETARY,
U.S. DEPARTMENT OF AGRICULTURE;
NATIONAL DAIRY PROMOTION BOARD, APPELLEES

AND

FRED LOVELL; LEE GREENWALT; JACKIE ROOT;
EARNEST NORMAN; STEPHEN MASHALL;
CECIL MOYER; JAMES VANBLARCOM,
INTERVENORS-APPELLEES

Appeal from the United States District Court
for the Middle District of Pennsylvania

Argued Jan. 12, 2004
Feb. 24, 2004

Before: SLOVITER, RENDELL and ALDISERT,
Circuit Judges

OPINION OF THE COURT

ALDISERT, Circuit Judge.

The American public is very familiar with the "Got Milk?" ads on television and in the print media.

This appeal requires us to decide whether a federal statute may compel a small dairy farm in Pennsylvania to help pay for the white-mustache milk advertisements and other dairy promotions. Implicated here are general First Amendment precepts that protect the right to refrain from speaking and the right to refrain from association, and the specific issue of whether the government may compel individuals to fund speech with which they disagree.

Joseph and Brenda Cochran are independent small-scale dairy farmers. They are not members of any dairy manufacturing or marketing cooperative. They alone determine how much milk to produce, how to sell and market it and to whom it will be sold.

The Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.* ("Dairy Promotion Act," "Dairy Act," or "Act"), provides for the creation of the Dairy Promotion Program and authorizes the Secretary of the Department of Agriculture ("Secretary") to issue an order creating the National Dairy Promotion and Research Board ("Dairy Board") to administer the program. To finance the promotional projects and the Dairy Board's administration of them, the Dairy Act and implementing order require every milk producer in the United States to pay mandatory assessments of 15 cents per hundredweight of milk sold.[1] *Id.* § 4504(g);

[1] The Dairy Act provides:

7 C.F.R. § 1150.152. Neither the Dairy Act nor the order permits dissenting milk producers to withhold contributions for advertising or promotional projects to which they object.

The Cochrans object to paying these assessments and filed an action in the United States District Court for the Middle District of Pennsylvania seeking a declaration that the Dairy Act violates their First Amendment rights of free speech and association.

The Cochrans operate a small commercial dairy farm with approximately 150 cows on about 200 acres of land in Tioga County, north-central Pennsylvania. In contrast to many larger-scale commercial dairy farms, the Cochrans employ what is known as "traditional" methods of dairy farming. Traditional dairy farming is less aggressive than larger-scale commercial farming, as it allows cows more room to move and graze and does not use the recombinant Bovine Growth Hormone (rBGH).[2] The Cochrans believe that their methods

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> The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall . . . collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.
>
> . . .
>
> The rate of assessment for milk . . . prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as determined by the Secretary.

7 U.S.C. § 4504(g).

[2] rBGH, also known as recombinant bovine somatotropin (rBST), is a genetically engineered growth hormone administered to dairy cows to boost milk production. Although the Food and Drug Administration has approved the use of rBGH for dairy

result in healthier cows, a cleaner environment and superior milk. The Cochrans object to the advertising under the Dairy Act because it conveys a message that milk is a generic product that bears no distinction based on where and how it is produced, and thereby forces them to subsidize speech with which they disagree.

As the First Amendment may prevent the government from prohibiting speech, it may also prevent the government from compelling individuals to express certain views, *Wooley* v. *Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943), or pay subsidies for speech to which individuals object, *Keller* v. *State Bar of California*, 496 U.S. 1, 9-10, 110 S. Ct. 2228, 110 L.Ed.2d 1 (1990); *Abood* v. *Detroit Dep't of Educ.*, 431 U.S. 209, 234, 97 S. Ct. 1782, 52 L.Ed.2d 261 (1977).

The Cochrans' lawsuit named as defendants Ann Veneman in her official capacity as Secretary of the United States Department of Agriculture ("USDA") and the National Dairy Promotion Board, and sought declaratory and injunctive relief from the remittance of compelled assessments by all dairy producers to finance generic dairy advertisements. Alleging that the Dairy Act unconstitutionally compels them to subsidize speech with which they disagree, the Cochrans filed a motion for summary judgment contending that their case was controlled by the teachings of *United States* v. *United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L.Ed.2d 438 (2001), in which the Supreme Court held

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production in the United States, consumer advocates and small dairy producers have questioned the long-term effects of the growth hormone on humans, cows and the environment. *See Barnes* v. *Shalala*, 865 F. Supp. 550, 554 (W.D. Wis. 1994).

that compelled subsidies under the Mushroom Promotion, Research, and Consumer Information Act of 1990 ("Mushroom Act"), 7 U.S.C. § 6101 *et seq.*, violated First Amendment protections.

The Government filed a motion to dismiss or, in the alternative, for summary judgment, arguing that this case is controlled by the teachings of *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L.Ed.2d 585 (1997), in which the Supreme Court upheld compelled subsidies for advertising California tree fruit under two marketing orders issued pursuant to the Agricultural Marketing and Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 608c *et seq.* The Government argued that the generic dairy advertising subsidized under the Dairy Act constitutes "government speech" and is therefore immune from First Amendment scrutiny and, moreover, that the Dairy Act is a species of economic regulation that does not violate the First Amendment.[3] The district court agreed with the Government and granted summary judgment in its favor, holding that the Dairy Act survives the deferential First Amendment scrutiny afforded to economic regulation. The Cochrans appeal.

We must decide whether the challenged communications pursuant to the Dairy Act are government speech and thereby immune from First Amendment scrutiny. If these communications are private speech, we

[3] Seven Pennsylvania dairy farmers who support the Dairy Promotion Act and Program petitioned the district court for leave to intervene as defendants and the district court granted the petition for intervention under Rule 24(a) of the Federal Rules of Civil Procedure. The Intervenors filed a cross motion for summary judgment, echoing the arguments made by the Government in its motion.

must decide whether the Dairy Act violates the First Amendment free speech and association rights of dairy farmers. In doing so, we must consider the quantum of scrutiny to be applied to determine the validity of regulations, such as the Dairy Act, that compel commercial speech.

For the reasons that follow we reverse the judgment of the district court and hold that the compelled speech pursuant to the Dairy Act is private speech, not government speech, and is therefore subject to First Amendment scrutiny. We hold also that the Act violates the Cochrans' First Amendment free speech and association rights by compelling them to subsidize speech with which they disagree. In so doing we conclude that the subsequent Supreme Court decisions of *Glickman* in 1997 and *United Foods* in 2001 severely dilute the precedential vitality of our ultimate holding in *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), in which we concluded that the compelled assessments pursuant to the Beef Promotion Research Act of 1985, 7 U.S.C. § 2901 *et seq.*, survived First Amendment scrutiny.

I.

In determining the side on which the axe must fall—on *Glickman* or on *United Foods*—we must start by examining why the Supreme Court went one way in its first case of *Glickman* and the other way in its subsequent decision in *United Foods*.

A.

In *Glickman*, producers of California tree fruits (including nectarines, plums and peaches) challenged the constitutionality of regulations contained in marketing orders promulgated by the Secretary pursuant to the AMAA, 7 U.S.C. § 608c *et seq.*, that imposed mandatory assessments on fruit tree growers to cover the expenses associated with the marketing orders, including the costs of generic advertising. 521 U.S. at 460, 117 S. Ct. 2130. The Court emphasized that besides the advertising decisions, the economic autonomy of the fruit tree growers was otherwise restricted by a broader collective arrangement set forth in the marketing orders:

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 469, 117 S. Ct. 2130.

In addition to advertising, the marketing orders for California fruit tree growers provided for mechanisms for establishing uniform prices, limiting the quality and quantity of tree fruit that could be marketed, determining the grade and size of the fruit and orderly disposing of any surplus. *Id.* at 461, 117 S. Ct. 2130. The orders also authorized joint research and development

projects, quality inspection procedures and standardized packaging requirements—all of which were financed by the compelled assessments. *Id.*

The Court determined that the collective arrangement of the fruit tree farmers was similar to the union arrangement at issue in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), and the bar association at issue in *Keller* v. *State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L.Ed.2d 1 (1990). In *Abood*, the Court held that the infringement upon First Amendment associational rights by compelled assessments for a union shop arrangement was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222, 97 S. Ct. 1782. Similarly, in *Keller*, the Court held that the infringement upon First Amendment associational rights by compelled assessments for a state bar program was constitutionally justified by the State's interest in regulating the legal profession and improving the quality of legal services. 496 U.S. at 13, 110 S. Ct. 2228. Finding parallels between the facts of *Abood* and *Keller*, in *Glickman* the Court concluded that as part of the AMAA marketing orders, the compelled assessments for generic advertising of California tree fruit were ancillary to a comprehensive marketing program, and therefore were "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." 521 U.S. at 477, 117 S. Ct. 2130.

"The opinion and the analysis of the Court [in *Glickman*] proceeded upon the premise that the producers were bound together and required by the

statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation." *United Foods*, 533 U.S. at 412, 121 S. Ct. 2334.

B.

Four terms later, in *United Foods* the Court held that mandatory assessments imposed on mushroom producers for the purpose of funding generic mushroom advertising under the Mushroom Act, 7 U.S.C. § 6101 *et seq.*, violated the First Amendment. 533 U.S. at 416, 121 S. Ct. 2334. The Court distinguished the statutory context at issue in *United Foods* from that in *Glickman*, explaining that under the stand-alone Mushroom Act "the compelled contributions for advertising are not part of some broader regulatory scheme" and the advertising was itself the "principal object" of the Mushroom Act. *Id.* at 415, 121 S. Ct. 2334. As such, "the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *Id.* at 413, 121 S. Ct. 2334 *(*citing *Abood*, 431 U.S. at 209, 97 S. Ct. 1782; *Keller*, 496 U.S. at 1, 110 S. Ct. 2228). The Court concluded that the compelled assessments pursuant to the Mushroom Act were unlike the situation in *Abood*, *Keller* and *Glickman*, in which:

> Those who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of moneys to pay for expressive activi-

> ties a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity.

Id. at 414, 117 S. Ct. 2130.

Fundamentally, the Court noted that "[w]e have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id.* at 415, 117 S. Ct. 2130. Concluding that the only program the compelled contributions for advertising pursuant to the Mushroom Act serve "is the very advertising scheme in question," the Court ruled that the compelled assessments were not permitted under the First Amendment. *Id.* at 416, 117 S. Ct. 2130.

C.

Guided by the express reasoning of the Court in *Glickman* and *United Foods*, we must first look at the broader statutory scheme presented in the Dairy Act, or more specifically, we must ascertain whether the dairy producers are "bound together and required by the statute to market their products according to cooperative rules" for purposes other than advertising, or speech. *United Foods*, 533 U.S. at 412, 121 S. Ct. 2334. It is to a description of the Dairy Act we now turn.

II.

The Dairy Promotion Program set forth in the Dairy Act is one in a long series of federal "checkoff" programs for promoting agricultural commodities.[4]

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[4] Other stand-alone checkoff programs established by Congress which have been subject to First Amendment challenges include: Beef Research and Information Act of 1976 ("Beef Act"), 7 U.S.C.

Enacted in 1983, the Dairy Act authorizes the Secretary of Agriculture to establish a program for the "advertisement and promotion of the sale and consumption of dairy products [and] for research projects related thereto." 7 U.S.C. § 4504(a). The declared purpose of the Dairy Act is to provide for "an orderly procedure for financing . . . and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace. . . ." *Id.* § 4501(b).

The Dairy Act is a stand-alone law that was not passed as part of any other federal dairy regulatory scheme. It directs the Secretary to appoint a Dairy Board composed of private milk producers to administer the Dairy Promotion Program. *Id.* §§ 4504(b) & (c). The Act provides that every milk producer must pay a mandatory assessment of 15 cents per hundredweight of milk sold to finance the promotional programs and the Dairy Board's administration of them.

Pursuant to the authority provided in 7 U.S.C. § 4503(a), the Secretary issued an order in March 1984 establishing the Dairy Board, 7 C.F.R § 1150.131, and the Board proceeded to collect the mandatory assessments from all milk producers, 7 C.F.R § 1150.152. For

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§ 2901 *et seq.* (invalidated by *Livestock Marketing Ass'n* v. *U.S. Dep't of Agric.*, 335 F.3d 711 (8th Cir. 2003) (reh'g den. Oct. 16, 2003)); Pork Promotion, Research, and Consumer Information Act of 1985 ("Pork Act"), 7 U.S.C. § 4801 *et seq.* (invalidated by *Michigan Pork Producers Ass'n, Inc.* v. *Veneman*, 348 F.3d 157 (6th Cir. 2003)); Mushroom Act, 7 U.S.C. § 6101 *et seq.* (invalidated in 2001 by *United Foods*, 533 U.S. at 405, 121 S. Ct. 2334). *Cf. Glickman*, 521 U.S. at 457, 117 S. Ct. 2130 (upholding as constitutional marketing orders for California tree fruits promulgated pursuant to the AMA*A*, 7 U.S.C. § 608c *et seq.*, which included compelled assessments to fund, among other things, generic advertising).

the Cochrans, the compelled assessments amount to roughly $3,500 to $4,000 per year.

The Dairy Board is composed of commercial milk producers who are nominated by "eligible associations," which are private associations of milk producers that engage in dairy promotion at the state and regional level. *Id.* §§ 1150.133, 1150.273. The primary consideration in determining an organization's eligibility is "whether its membership consists primarily of milk producers who produce a substantial volume of milk" and whose overriding interests lay in the production and promotion of fluid milk and other dairy products. *Id.* § 1150.274(b).

In 1994, the Dairy Board created Dairy Management, Inc. ("DMI"), a District of Columbia corporation that now oversees and administers the promotional activities of the Dairy Act. DMI is a joint undertaking of the Dairy Board and the United Dairy Industry Association ("UDIA"), which is an association of state and regional dairy promotional programs that are considered "Qualified Programs" under the Dairy Act. "Qualified Programs" are local promotional programs, many of which preexisted the Dairy Act, to which milk producers may contribute a portion of the money they would otherwise pay in assessments under the Act. *See* 7 U.S.C. § 4504(g)(4), 7 C.F.R. §§ 1150.152(c), 1150.153. The Act thus requires dairy farmers to pay either the full 15 cent per hundredweight assessment to the Dairy Program or part to the Dairy Program and part to a Qualified Program that engages in state or regional generic advertising. The Dairy Board and the DMI Board are composed entirely of private milk producers and other private parties, and the Dairy Promotion Program is funded entirely by private milk producers

through the compelled assessments. The Dairy Promotion Program website explains: "Checkoff programs are funded by dairy producers—NOT TAXPAYERS. They are not governmental programs; rather, they are businesses with governmental oversight."[5]

The Secretary's oversight responsibilities pursuant to the Dairy Act are conducted by the Agricultural Marketing Service ("AMS"), a division of the USDA, and are limited to ensuring that the Dairy Promotion Program is in compliance with the Act. *See*, *e.g.*, 7 U.S.C. § 4507(a) (authorizing the Secretary to terminate an order issued under the Act only when she determines that it "obstructs or does not tend to effectuate the declared policy of" the Act). AMS guidelines explain that "[i]t is the policy of AMS in carrying out the oversight responsibility to ensure that legislative, regulatory, and Department policy requirements are met. It is not the intent to impose constraints on board operations beyond these requirements." AMS, Guidelines for AMS Oversight of Commodity Research and Promotion Programs 1 (1994). The Secretary's oversight functions for the Dairy Program are funded by the compelled assessments. 7 U.S.C. § 4504(g)(2); 7 C.F.R. § 1150.151(b). Moreover, the dairy producers, not the government, control whether the Dairy Promotion Program continues via a referendum process. 7 U.S.C. § 4506(a).

All advertising and promotional programs that are financed by the compelled assessments under the Dairy

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[5] Dairy checkoff Works!—How the Dairy Checkoff works, available at http://www.dairycheckoff.com/howitworks.htm (last visited June 3, 2002 (J.A. at 231)).

Act and created by the Dairy Board and DMI promote milk as a generic product. 7 C.F.R. § 1150.114. Among advertising campaigns financed by the Dairy Promotion Program are "Got milk?" and "Ahh, the power of cheese."

III.

In addition to the Dairy Act, the dairy industry is subject to a patchwork of federal and state regulatory laws. The district court noted four federal laws in particular that it deemed relevant to this case: (1) the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 608c *et seq.*; (2) the Agriculture Act of 1949, 7 U.S.C. § 1446; (3) import control regulations under 19 U.S.C. § 1202; and (4) the Capper-Volstead Act, 7 U.S.C. § 291.

An examination of the provisions of these statutes is crucial to determine whether these legislative acts, in conjunction with the Dairy Act, bring the case at bar within the rubric of *Glickman—i.e.*, requiring that milk producers are bound together and obligated by statute to market their products according to some set of cooperative rules. The district court held that such a cooperative arrangement exists for dairy producers, but we conclude otherwise.

A.

The AMAA, 7 U.S.C § 608c, permits the Secretary to issue marketing orders that regulate the handling and sales of various agricultural commodities, including milk, in different regions of the country. For milk, the marketing orders establish a classification system and set minimum prices that handlers must pay in the regions in which the orders apply. *See* 7 U.S.C.

§ 608c(5); 7 C.F.R. § 1000.1 *et seq.* The AMAA applies only to "handlers"[6] of the covered commodities. 7 U.S.C. § 608c(1) & (5)(A). "Producers," such as dairy farmers in general, and Joseph and Brenda Cochran in particular, are specifically exempted from the application of marketing orders. *Id.* § 608c(13)(B) (stating that no marketing order "shall be applicable to any producer in his capacity as a producer").

Although milk marketing orders restrict the decisions of dairy handlers, they do not interfere with the decisions of dairy producers, such as the Cochrans, with regard to how much milk to produce, sell or whether they must sell milk at all to dairy handlers. *See id.* § 608c(5).[7] At least 25 percent of the milk sold in the United States is sold outside of federal milk marketing orders. The Cochrans are able to and do sell much of their milk outside any milk marketing order.

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[6] A handler is a person who purchases milk from a producer in an unprocessed form for the purpose of processing it.

[7] Milk marketing orders under the AMAA are implemented on a regional basis. *See* 7 U.S.C. § 608c(11). Not all parts of the country are covered, and some states—including California, Virginia, Maine and Montana—are outside the territory of any milk marketing order. Portions of Pennsylvania fall within two different milk marketing regions, the Northeast Area and the Mideast Area. *See* 7 C.F.R. §§ 1001.1, 1033.1. Certain portions of the state, however, including where the Cochrans are located, fall outside of any federal milk marketing order. The effect of the AMAA provisions is that any particular producer's milk is subject to a marketing order only if the producer chooses to sell to a regulated handler in an area covered by a marketing order. *See id.* §§ 101.13, 1033.13.

B.

The Agricultural Act of 1949, 7 U.S.C. § 1446, establishes a price support program wherein manufacturers and processors of cheese, nonfat dry milk and butter can sell those products to the federal government as buyer of last resort. Producers *of fluid milk*, such as the Cochrans, however, are not covered by the Agricultural Act and are not permitted to sell their product to the government under the price support program.

C.

Similarly, the import control regulations under Chapter 4 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, subject a multitude of commodities and products to annual import quotas. Although certain dairy products are included—namely butter, dry milk and cheese—fluid *milk* is not. *See* 7 C.F.R. Pt. 6, Apps. 1, 2, 3.

D.

Finally, the Capper-Volstead Act, 7 U.S.C. § 291, permits producers of agricultural products—including milk, mushrooms and others—to enter into manufacturing and marketing cooperatives without fear of violating antitrust laws. It does not, however, require producers to enter into such cooperatives, as federal law expressly protects producers' freedom not to join any cooperative. *See* Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 *et seq.*; *Michigan Canners & Freezers Ass'n, Inc.* v. *Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 477-478, 104 S. Ct. 2518, 81 L.Ed.2d 399 (1984). The Cochrans do not belong to any cooperatives protected by the antitrust exemption created by the Capper-Volstead Act.

E.

Considering the foregoing provisions of the Dairy Act and other statutes governing the dairy industry, we now turn to the First Amendment issues that constitute the heart of this appeal.[8]

IV.

We must first consider whether the compelled assessments generated under the Dairy Act constitute private or government speech. Although the district court did not address this issue, the Government contended before the district court that the expressions generated under the Dairy Act constitute government speech. Therefore, the issue is subject to our review.

The First Amendment prohibits the government from regulating private speech based on its content, but the Court has "permitted the government to regulate the content of what is or is not expressed when [the government] is the speaker or when [the government] enlists private entities to convey its own message." *Rosenberger* v. *Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995).

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[8] The United States District Court for the Middle District of Pennsylvania had jurisdiction pursuant to 28 U.S.C. § 1331 based on the Cochrans' First Amendment claim. We have jurisdiction in this timely appeal pursuant to 28 U.S.C. §§ 1291. We review de novo the constitutionality of an Act of Congress. *Dyszel* v. *Marks*, 6 F.3d 116, 123 (3d Cir. 1993). Similarly, our review of the district court's granting of judgment on the pleadings and summary judgment is plenary. *Anker Energy Corp.* v. *Consolidation Coal Co.*, 177 F.3d 161, 169 (3d Cir. 1999).

The Court has not decided whether speech generated under commodity promotion laws such as the Dairy Act constitutes government speech and is thereby immune from First Amendment scrutiny.[9] But in *Frame*, this court did meet the issue. 885 F.2d at 1132-1133.

In line with our sister Courts of Appeals in *Michigan Pork Producers Ass'n, Inc.* v. *Veneman*, 348 F.3d 157, 161-162 (6th Cir. 2003) and *Livestock Marketing Ass'n* v. *U.S. Dep't of Agric.*, 335 F.3d 711, 720 (8th Cir. 2003), we held that the Beef Promotion Program was not government speech because it required only beef producers to fund it and it attributed the advertising under the program to the beef producers. *Frame*, 885 F.2d at 1132-1133. Recognizing that the Beef Promotion Program directed the Secretary to appoint all Cattlemen Board members and approve all budgets, plans, contracts and projects entered into by the Board, this court nevertheless concluded that "[t]he Secretary's extensive supervision . . . does not transform this self-help program for the beef industry into 'government speech.'" We explained:

> The Cattlemen's Board seems to be an entity "representative of one segment of the population, with certain common interests." Members of the Cattlemen's Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private

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[9] The two decisions of the Court involving commodity promotion programs do not address the issue of government speech. In *Glickman*, the Secretary of Agriculture waived the issue by not pursuing it before the Supreme Court. 521 U.S. at 482 n. 2, 117 S. Ct. 2130 (Souter, J., dissenting). In *United Foods*, the Court refused to address the issue because the government failed to raise it before the Court of Appeals. 533 U.S. at 416-417, 121 S. Ct. 2334.

> sector. The pool of nominees from which the Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those that "have a history of stability and permanency," and whose "primary or overriding purpose is to promote the economic welfare of cattle producers."

Id. at 1133 (quoting 7 U.S.C. § 2905(b)(3) & (4)). The government's role in the Dairy Promotion Program is in all material respects the same as it was in the Beef Promotion Program, and under the precedent established in *Frame*, the Secretary's supervisory responsibilities are not sufficient to transform the dairy industry's self-help program into "government speech." On the dairy checkoff website, the government itself describes the Dairy Promotion Program as a non-governmental program, financed and directed by dairy farmers.

Although this court's First Amendment discussion and ultimate holding in *Frame* have been abrogated by *Glickman* and *United Foods*, none of the Court's subsequent decisions regarding "government speech" undermine our analysis of that issue in Frame.[10] Accord-

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[10] Notwithstanding the Government's assertions to the contrary, we are not convinced that any decisions rendered by the Court in the years following our decision in *Frame* require us to cast aside the government speech analysis we performed in *Frame*. *See Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 149 L.Ed.2d 63 (2001) (concluding that restrictions placed on the private speech of a lawyer receiving government funding from the Legal Services Corporation were unconstitutional); *Bd. of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 120

ingly, we conclude that this is a private speech case, and thus is not immune from First Amendment scrutiny.

V.

The teachings of *United Foods* require us to decide whether the dairy producers are "bound together and required by the statute to market their products according to cooperative rules[,]" 533 U.S. at 412, 121 S. Ct. 2334, for purposes other than advertising, or speech. That is our next task.

The Cochrans contend that the Dairy Act violates their First Amendment free speech and association rights by compelling them to subsidize generic advertising that promotes milk produced by methods they view as wasteful and harmful to the environment.

The First Amendment protects the right to refrain from speaking and the right to refrain from association. *See*, *e.g.*, *Wooley*, 430 U.S. at 714, 97 S. Ct. 1428. Moreover, the government may not compel individuals to fund speech or expressive associations with which they disagree. *See United Foods*, 533 U.S. at 411, 121 S. Ct. 2334. "First Amendment values are at serious risk if

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S. Ct. 1346, 146 L.Ed.2d 193 (2000) (stating in dicta, in a case where the government affirmatively disavowed any connection to the speech involved, that a government speech analysis might apply if a state university used general tuition money to fund speech attributed to the school or its administrators); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995) (holding that Amtrak is a government actor for First Amendment purposes because it was created by statute to further government objectives and the government maintained substantial control over its daily operations); *Rust* v. *Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991) (concluding that the government can prevent private doctors at family planning clinics that receive federal funding from providing abortion counseling).

the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors. . . . As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny." *Id.* The individual's disagreement can be minor, as "[t]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 767, 113 S. Ct. 1792, 123 L.Ed.2d 543 (1993)*)*. When, however, regulation compelling funding for speech is ancillary to a broader collective enterprise that otherwise restricts the individual's market autonomy, it is considered "economic regulation," which enjoys a "strong presumption of validity" when facing a First Amendment challenge. *See Glickman*, 521 U.S. at 477, 117 S. Ct. 2130.

We conclude that in upholding as constitutional the compelled subsidies under the Dairy Act, the district court misapplied *Glickman* and misconstrued the effect of the "entire regulatory scheme applicable to milk producers. . . ." (District Court Op. at 15 n. 5.) The Court in *United Foods* made clear that *Glickman* applied only in circumstances similar to *Abood* and *Keller*—in which individuals are "bound together" in a collective enterprise, such as a union or an integrated state bar, and the compelled subsidies are the "logical concomitant of a valid scheme of economic regulation." 533 U.S. at 412, 121 S. Ct. 2334.

The provisions of the Dairy Act do not require milk producers to participate in a collective enterprise and do not compel them to market their product, fluid milk, according to any rules of a cooperative. Although the dairy industry is "regulated" in the sense that it is

subject to a patchwork of state and federal laws, there is no association that all milk producers must join that would make the entire industry analogous to a union, an integrated bar or the collective enterprise at issue in *Glickman*.

The Dairy Act is a free-standing promotional program that applies to *all* dairy producers regardless of whether they are subject to marketing orders or any other dairy regulations. It is not ancillary to any collective enterprise or compelled association with a non-speech purpose because there is no such enterprise or association for milk that encompasses all dairy producers. Indeed, the AMAA provision for milk marketing orders, which preexisted the Dairy Act, authorizes the Secretary and marketing administrators to create dairy promotional programs that literally would be ancillary to the regulatory aspects of the milk marketing orders. *See* 7 U.S.C. § 608c(5)(I). Congress chose not to utilize this precise provision of the AMAA, however, and instead adopted an entirely separate program which does not operate in concert with any collective aspect of any milk marketing order.

Moreover, as independent small-scale dairy producers, the Cochrans are exempted from the regional marketing orders under the AMAA and have chosen not to enter into manufacturing and marketing cooperatives. They, and they alone, determine how much milk to produce, how to sell and market it and to whom it will be sold. Nevertheless under the Dairy Act they are compelled to pay assessments to subsidize generic dairy advertising, a form of speech with which they are in total disagreement. *Cf. Glickman*, 521 U.S. at 471, 117 S. Ct. 2130 (noting that "none of the generic ad-

vertising conveys any message with which respondents disagree").

Furthermore, as the Court in *United Foods* determined that speech is the principal purpose of the Mushroom Act, so it is of the Dairy Act.[11] Indeed, "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *United Foods*, 533 U.S. at 412, 121 S. Ct. 2334. In *United Foods*, the Court made clear that compelled subsidies may not be upheld where they are only germane to a program whose "principal object is speech itself." *Id.* at 415, 121 S. Ct. 2334.

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[11] Congress' declared policy of the Mushroom Act was

> that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—(1) strengthen the mushroom industry's position in the marketplace; (2) maintain and expand existing markets and uses for mushrooms; and (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). Congress' declared purpose for the Dairy Act is

> that it is in the public interest to authorize the establishment . . . of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

7 U.S.C. § 4501(b).

We conclude, therefore, that being compelled to fund advertising pursuant to the Dairy Act raises a First Amendment free speech and associational rights issue. But our determination that the Act's compelled assessments for generic advertising implicate the Cochrans' First Amendment rights does not end our inquiry. As this court held in *Frame*, "[t]he rights of free speech and association are not absolute. Thus, we must next identify the proper standard for evaluating whether the statute . . . nevertheless passes constitutional muster." 885 F.2d at 1133.[12]

VI.

This case is properly characterized as a compelled commercial speech case. *See United Foods*, 533 U.S. at 410, 121 S.Ct. 2334; *Frame*, 885 F.2d at 1146 (Sloviter, J., dissenting). The Supreme Court, however, has left unresolved the standard for determining the validity of laws compelling commercial speech, and the circuit courts are divided on the issue. There are at least four variations in the judiciary's cumulative experience. One is the more lenient standard applied to commercial

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[12] Upon concluding that milk producers are regulated to a similar degree as the California tree fruit growers in *Glickman*, the district court applied a three-part test set forth by the Supreme Court in *Glickman*: (1) whether the Act imposes a restraint on the freedom to communicate; (b) whether the Act compels any person to engage in any actual or symbolic speech; (c) whether the Act compels dairy producers to endorse or finance any political or ideological views. (District Court Op. at 16-18.) This test, however, is inappropriate because, like the Supreme Court in *United Foods*, we have concluded that the Dairy Act is not a species of economic regulation, as it is not ancillary to a more comprehensive program restricting the markeing autonomy of dairy farmers. In *United Foods* the court did not apply this three-part test. Nor do we.

speech cases. *See Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 564, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980). Another is the "germaneness" test of compelled speech cases. *See, e.g., Abood*, 431 U.S. at 235-236, 97 S. Ct. 1782. Still another is an adaptation of the commercial speech standard. *See Livestock Marketing*, 335 F.3d at 722-723. And, in *Frame*, a pre-*Glickman* and pre-*United Foods* case, this court applied the stringent level of scrutiny for associational rights cases. 885 F.2d at 1134. We now summarize the various standards.

A.

In *Central Hudson*, the Supreme Court held that to evaluate the constitutionality of regulatory restrictions on *commercial* speech the Constitution requires only intermediate scrutiny—namely, that (1) the state must "assert a substantial government interest"; (2) "the regulatory technique must be in proportion to that interest"; and (3) the incursion on commercial speech "must be designed carefully to achieve the State's goal." 447 U.S. at 564, 100 S. Ct. 2343. Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561, 100 S. Ct. 2343.

But the Court has left open the question of whether *Central Hudson*'s more relaxed First Amendment test applies to cases involving compelled commercial speech. In *United Foods* the Court stepped back from addressing the issue in *ipsis verbis*, explaining: "the Government itself does not rely upon *Central Hudson* to challenge the Court of Appeals' decision, . . . and we therefore do not consider whether the Government's interest could be considered substantial for

purposes of the *Central Hudson* test." 533 U.S. at 410, 121 S. Ct. 2334. Nevertheless, in the earlier case of *Glickman*, the Court questioned the application of the commercial speech test to compelled speech cases:

> The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech. Given the fact that the Court of Appeals relied on *Abood* for the proposition that the program implicates the First Amendment, it is difficult to understand why the Court of Appeals did not apply *Abood*'s "germaneness" test.

521 U.S. at 474 n. 18, 117 S. Ct. 2130.

Indeed, in *United Foods*, notwithstanding its specific disclaimer regarding *Central Hudson*, the Court seemingly applied the "germaneness" test:

> The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance. The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; *the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself*; and the rationale of *Abood* extends to the party who objects to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.

533 U.S. at 415-416, 121 S.Ct. 2334 (emphasis added).

As we previously explained, the purpose of the Dairy Act is in all material respects the same as that of the Mushroom Act at issue in *United Foods*, and the Dairy Act is not ancillary to a broader cooperative marketing regime like the fruit tree marketing orders at issue in *Glickman*. The compelled assessments for generic dairy advertising under the Dairy Act are germane to nothing but the speech itself. "[A]lmost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412, 121 S. Ct. 2334. It would thus seem that the Dairy Act would not survive *Abood*'s germaneness test.

Other courts have applied the germaneness test to cases involving compelled assessments pursuant to promotional programs and have rejected the application of *Central Hudson*. *See*, *e.g.*, *Michigan Pork*, 348 F.3d at 163 (noting that "[e]ven assuming that the advertising funded by the [Pork] Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech—commercial or otherwise—that is compelled"); *In re Washington State Apple Adver. Comm'n*, 257 F. Supp.2d 1274, 1287 (E.D. Wash. 2003) (concluding that "[b]ecause the Commission's assessments do not restrict speech, it is inappropriate to apply the *Central Hudson* test for restrictions on commercial speech").

In *Livestock Marketing*, however, the Eighth Circuit concluded that an adaptation of the *Central Hudson* test applied, explaining that "*Central Hudson* and the case at bar both involve government interference with private speech in a commercial context." 335 F.3d at 722. All the same, the court concluded that the Beef Act did not survive the intermediate scrutiny of

Central Hudson. *Id.* at 725-726. Relying on the reasoning set forth in *United Foods*, the court determined that the beef checkoff program is in all material respects identical to the mushroom checkoff program, and concluded that "the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment free speech right." *Id.*

Finally, in *Frame*, which was decided before the teachings of both *Glickman* and *United Foods*, this court applied the stringent associational rights standard but nevertheless upheld the constitutionality of the Beef Act, 7 U.S.C. § 2901 *et seq.* Back in 1989, this court concluded that the government's interest in "maintaining and expanding beef markets proves . . . compelling[,]" and "[m]aintenance of the beef industry ensures preservation of the American cattlemen's traditional way of life." *Frame*, 885 F.2d at 1134-1135 (citations omitted).

Judge Sloviter, however, dissented on this issue in *Frame*:

> I doubt that the type of compelled speech at issue here can be justified on any basis. Nonetheless, I do not reach the majority's stringent associational rights standard because I believe that no justification can be found, even under the less exacting criteria adopted by the Supreme Court in evaluating the permissibility of regulation of commercial speech [in *Central Hudson*]. . . . While the government has a general interest in the health of the beef industry, it does not follow that the government has

> a substantial interest in compelling the beef industry to make and support such a promotion campaign. Instead, . . . the messages represent the economic interests of one segment of the population. . . .

Id. at 1146-1147 (Sloviter, J., dissenting) (citations and internal quotations omitted).

As in *Frame*, the Government here argues that it has a sufficient interest in increasing the demand for an agricultural product. Moreover, the Government contends that it has an interest in decreasing its obligation to purchase dairy products under the price support program, 7 U.S.C § 1446. We previously have emphasized, however, that the Court's subsequent holding in *United Foods* that clarified and limited the teachings of *Glickman*, cut away the underpinning of this court's analysis in *Frame*. *United Foods* makes clear that the government may not compel individuals to support an advertising program for the sole purpose of increasing demand for that product. 533 U.S. at 415, 121 S. Ct. 2334. In *United Foods*, the Court concluded that the Mushroom Act's compelled subsidies would be unconstitutional even under the lesser scrutiny accorded to commercial speech. *Id.* at 410, 121 S. Ct. 2334.

Although the Government's contention that it has a substantial interest in decreasing its obligation under the dairy price support program is somewhat unique from the government interest asserted in *United Foods*, this interest is undermined by the fact that as a stand-alone statute, the Dairy Act does not operate in conjunction with the price support program. Indeed, producers of liquid milk such as the Cochrans are not covered by the support program. Moreover, reductions in the government's obligations under the price support

program are insignificant to the Dairy Promotion Program's existence, as whether the compelled assessments continue is controlled by the dairy producers via the referendum process. 7 U.S.C. § 4506(a).

We conclude, therefore, that the government's interest in promoting the dairy industry is not sufficiently substantial to justify the infringement on the Cochran's First Amendment free speech and association rights. As Judge Sloviter suggested in her dissent in *Frame*, promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry's interest more so than the government's. We believe that the Supreme Court reached the same conclusion by ruling in *United Foods* that the compelled assessments pursuant to the Mushroom Act are not permitted by the First Amendment.

B.

In light of the reluctance of the Supreme Court in *United Foods* to enter the controversy over the applicable scrutiny for compelled commercial speech cases, however, we will follow suit. "[W]e find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." 533 U.S. at 410, 121 S. Ct. 2334.[13]

The compelled assessments for generic dairy advertising under the Dairy Act relate to speech and only to speech. Indeed, "almost all of the funds collected

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[13] We reach this conclusion whether accepting the standard explicitly expressed in *Frame* or deciding that in view of the Court's discussion in *United Foods*, that standard is not longer controlling.

under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412, 121 S. Ct. 2334.

Measured by any degree of scrutiny set forth in the foregoing discussion, we conclude that this case runs on all fours with the teachings and holding of *United Foods*, and accordingly hold that the Dairy Promotion Stabilization Act of 1983 does not survive the First Amendment challenge lodged by Appellants Joseph and Brenda Cochran. The district court erred in sustaining the constitutionality of the Dairy Act on the basis of *Glickman*.

* * * * * *

In sum, we conclude that the generic advertising pursuant to the Dairy Promotion Stabilization Act of 1983 does not constitute government speech and is therefore subject to First Amendment scrutiny. We hold that the Dairy Act violates the Cochrans' First Amendment free speech and associational rights. Although the dairy industry may be subject to a labyrinth of federal regulation, the Dairy Act is a stand-alone law and the compelled assessments for generic dairy advertising are not germane to a larger regulatory purpose other than the speech itself.

The judgment of the district court sustaining the constitutionality of the Dairy Promotion Stabilization Act of 1983 will be reversed and the proceedings remanded with a direction to enter a decree in favor of Appellants in accordance with the foregoing.

RENDELL, Circuit Judge, concurring.

RENDELL, Circuit Judge.

I join in our opinion and judgment but write separately to register my view that, having found that the assessments do not pass muster under the Supreme Court's analysis in *United Foods*, and, having noted at the end of Pat IV that the compelled subsidies were assessed to support a program whose principal object was speech itself, we need not engage in the exercise of determining the "standard" regarding the extent of the government's interest for purposes of a commercial speech analysis under *Central Hudson*, as the opinion does at Part VI-A. Twice—in both *Glickman* and *United Foods*—the Supreme Court has questioned the need for engaging in a *Central Hudson* analysis.[14]

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[14] The Court has not treated these cases as involving a discrete commercial speech issue, instead indicating that "[t]he question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." *United Foods*, 533 U.S. at 410, 121 S. Ct. 2334; *see also id.* (stating that, even if commercial speech is less protected than other speech, there is "no basis under either *Glickman* or our other precedents to sustain the compelled assessments," but refusing to consider "whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test"); *Glickman*, 521 U.S. at 474 & n. 18, 117 S.Ct. 2130 (noting that it was "error for the [Ninth Circuit] to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising," and stating that the Ninth Circuit "fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech"). In fact, in *United Foods* the Court appears to explicitly endorse the applicability of the *Abood* /*Keller* germaneness test: "It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression

And, I think it unnecessary to apply *Central Hudson* in light of the Court's analysis in *United Foods*.[15]

In *United Foods* the Court distinguished the situation it faced from the one it considered in *Glickman* by examining the following question: Is the challenged assessment part of a "broader regulatory system" that does not have speech as its primary object. 533 U.S. at 415, 121 S. Ct. 2334. There appear to be two parts to this basic inquiry. First, are the plaintiffs part of a group that is "bound together and required . . . to market their products according to cooperative rules?" *Id.* at 412, 121 S. Ct. 2334. Second, is the assessment regulation related to and in furtherance of other non-speech purposes, carrying out other aspects to further other economic, societal, or governmental goals? *Id.* at 415, 121 S. Ct. 2334. Even if the answer to the first question is "no," the assessment might nonetheless be

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by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." 533 U.S. at 413, 121 S. Ct. 2334 (citing *Abood* and *Keller*).

[15] The Sixth Circuit, in *Michigan Pork Producers Ass'n, Inc.* v. *Veneman*, 348 F.3d 157 (6th Cir. 2003), also rejected the application of the *Central Hudson* test to an assessment created by a similar promotional program. I find that court's comments on this matter to be instructive: "[W]e find inapplicable to this case the relaxed scrutiny of commercial speech analysis provided for by *Central Hudson*, and relied upon by Appellants. The Pork Act does not directly limit the ability of pork producers to express a message; it compels them to express a message with which they do not agree. Even assuming that the advertising funded by the Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech—commercial or otherwise—that is compelled. It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece." *Id.* at 163 (citation omitted).

permitted if it is not only related to speech. This second inquiry could signal consideration of "germaneness" if, in fact, other goals were implicated. But here, we answered "no" to both questions: we decided that the Cochrans did not surrender their freedom to make independent competitive choices to any collective enterprise, and we concluded that speech was the only purpose of the Dairy Act. Thus, it was purely "compelled speech," forbidden by *United Foods* under *any* level of scrutiny. 533 U.S. at 410, 121 S. Ct. 2334. In fact, after discussing the various standards potentially applicable here, Judge Aldisert clearly states in the ensuing Part VI-B that under any level of scrutiny, the assessments for speech only do not pass constitutional muster given *United Foods*. The analysis in Part VI-A regarding the proper level of scrutiny is therefore unnecessary, and, I believe, dicta.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

No. 4:CV-02-0529

JOSEPH P. COCHRAN, ET AL., PLAINTIFFS

v.

ANN VENEMAN, ET AL., DEFENDANTS
AND
FRED LOVELL, ET AL., INTERVENOR DEFENDANTS

MARCH 24, 2003

OPINION

JONES, District Judge.

This is a declaratory judgment action brought pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57 by Plaintiffs Joseph S. Cochran and Brenda S. Cochran ("Plaintiffs" or "the Cochrans"). Plaintiffs seek a declaratory judgment ruling that the Dairy Promotion and Research Program ("the Dairy Program") as set forth in Title I, Subtitle B of the Dairy Promotion Stabilization Act of 1983 ("the Stabilization Act" or "the Act"), Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C. § 4504(g) is an unconstitutional restriction on their right to free speech. Plaintiffs also seek an injunc-

tion against Ann Veneman, Secretary of the United States Department of Agriculture ("the Secretary") and the National Dairy Promotion and Research Board ("the Dairy Board") (together, "the Governmental Defendants"), enjoining the continued collection of the dairy checkoff assessment created pursuant to the Act.

Some of the advertisements funded by assessments collected pursuant to the provisions of the Stabilization Act currently under attack by Plaintiffs are part of the Milk Mustache/got milk?® campaign. The question presented to the Court, phrased in an equally ungrammatical fashion, may be reduced to: "Got Advertising Money for Milk?".

For the reasons that follow, we conclude that the Dairy Program and resulting diary checkoff assessment are not unconstitutional. Our holding will allow the American public to continue to view advertisements containing white mustachioed celebrities and other pop culture icons depicting the salutary effects of milk.

PROCEDURAL HISTORY:

Plaintiffs are dairy producers engaged in the production of milk for commercial use on a dairy farm located in Pennsylvania. They initiated this action by filing a complaint for declaratory and injunctive relief against the Governmental Defendants on April 2, 2002. The case was assigned to the Honorable James F. McClure Jr.

On June 6, 2002, Plaintiffs filed a motion for summary judgment. Thereafter, on June 14, 2002, the Governmental Defendants filed a motion to dismiss, or in the alternative, for summary judgment.

By Order issued August 6, 2002, this matter was transferred to the undersigned.

On January 13, 2003, this Court granted the Petition to Intervene brought by Fred Lovell, Lee Greenwalt, Jackie Root, Earnest Norman, Stephen Marshall, Cecil Moyer, and James Vandblarcom ("the Intervening Parties" or "the Intervenors") on June 14, 2002. The Intervening Parties are dairy producers who, unlike Plaintiffs, support the dairy checkoff provision within the Act and believe it to be constitutional in all respects.

On January 21, 2003, the Intervening Parties filed their own motion for summary judgment.

Each of the pending motions has been fully briefed by the parties. Oral argument was held on March 19, 2003. This matter is now ripe for disposition.

STANDARD OF REVIEW:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[1] F.R.C.P. 56(c); *see also Turner* v. *Schering-Plough Corp.*, 901 F.2d 335, 340 (3d Cir.1990). The party moving for summary judgment bears the burden of showing "there is no genuine issue for trial." *Young* v. *Quinlan*, 960 F.2d 351, 357 (3d Cir. 1992). Summary judgment should not be granted when there is a dis-

[1] We note that the Governmental Defendants filed a motion to dismiss or, in the alternative, one for summary judgment. Because the Governmental Defendants presented matters outside of the pleadings for the Court's consideration within their motion, we will treat the motion as one for summary judgment under Federal Rule of Civil Procedure 56. *See* Fed. R. Civ. P. 12(b).

agreement about the facts or the proper inferences which a fact finder could draw from them. *Peterson* v. *Lehigh Valley Dist. Council*, 676 F.2d 81, 84 (3d Cir. 1982).

Initially, the moving party has a burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corporation* v. *Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). This burden may be met by the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving party will bear the burden of proof at trial. *Id.* at 325, 106 S. Ct. 2548.

Rule 56 provides that, where such a motion is made and properly supported, the non-moving party must then show by affidavits, pleadings, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The United States Supreme Court has commented that this requirement is tantamount to the non-moving party making a sufficient showing as to the essential elements of their case that a reasonable jury could find in its favor. *Celotex Corporation* v. *Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

It is important to note that "the non-moving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact." *Pastore* v. *Bell Tel. Co. of Pa.*, 24 F.3d 508, 511 (3d Cir. 1994) (citation omitted). However, all inferences "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apple BMW, Inc.* v. *BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) (citations omitted).

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). "As to materiality, the substantive law will identify which facts are material." *Id.* at 248, 106 S. Ct. 2505. Furthermore, a dispute is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

STATEMENT OF RELEVANT FACTS:

The history of government involvement in the regulation of milk is an extensive one. "Federal programs have been deeply imbedded in the economic fabric of the United States dairy industry" since the late 1930s. S. Rep. No. 98-163, 13, *reprinted in* 1983 U.S.C.C.A.N. 1658, 1670.

There are four clearly interrelated federal programs involved:

1. The dairy price support program which explicitly puts a floor under the price of manufacturing grade milk and thus maintains a floor under all milk prices.

2. The milk marketing order program which establishes minimum prices for fluid grade milk in most parts of the country.

3. Import controls which protect the price support program and keep the U.S. government from supporting world milk prices.

> 4. Federal cooperative policy which encourages the development of farmer-owned cooperatives but provides they may not use their market power to raise prices excessively.

Id. "The thrust of these programs has been to deal with the level of milk prices and with problems of instability in milk prices and dairy farm incomes." *Id.*

In 1983, upon finding that "dairy products are basic foods that are a valuable part of the human diet," that "the production of dairy products plays a significant role in the Nation's economy," that "dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment," and that "the maintenance and expansion of existing markets for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation," Congress created the Dairy Promotion Program. 7 U.S.C. §§ 4501(a)(1)-(4). In so doing, Congress declared

> that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

7 U.S.C. § 4501(b).

In accordance with the guidelines set forth within the Stabilization Act, *see* 7 U.S.C. § 4505(b)(1), the Dairy Board was established by an order ("the Dairy Order") issued by the Secretary. *See* 7 C.F.R. § 1150.131(a). Currently, the Dairy Board consists of 36 milk producers, each appointed by the Secretary. *See* 7 C.F.R. § 1150.131(a), 7 C.F.R. § 1150.135; *see also* 7 U.S.C. § 4504(b)(2). Vacancies on the Dairy Board "occasioned by the death, removal, resignation, or disqualification of any member" are filled by the Secretary from a list of nominations made by the Board. 7 C.F.R.§ 1150.136.

The powers of the Dairy Board are limited to those enumerated within the Stabilization Act. *See* 7 U.S.C. § 4504(c). Included among those enumerated powers are the authority to "administer the provisions of [the Dairy Order] in accordance with its terms and condtions," 7 C.F.R. § 1150.139(b); *see also* 7 U.S.C. § 4504(c)(2), and to

> receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals.

7 C.F.R. § 1150.139(a); *see also* 7 U.S.C. § 4504(c)(1). The Act provides that the Dairy Board will "provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for nutrition education projects, and for the disbursement of necessary funds for such purposes." 7 U.S.C. § 4505(a). Advertising created by the Dairy Board must be approved by the

Agricultural Marketing Service ("AMS"), the division of the Department of Agriculture to which the Secretary has assigned this congressionally delegated role. (Gov. Defs.' Br. Supp. Summ. J., Ex. A at 1 and ¶ VII(B)).

Of particular relevance to the case at bar, the Stabilization Act contains a provision for assessments which are to be issued to milk producers and thereafter paid to the Dairy Board:

> (g) Assessments
>
> (1) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.
>
> (2) The assessment shall be used for payment of the expenses in administering the order, with provision for a reasonable reserve, and shall include those administrative costs incurred by the Department after an order has been promulgated under this subchapter.
>
> (3) The rate of assessment for milk produced in the United States and imported dairy products prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as determined by the Secretary.

> (4) A milk producer or the producers' cooperative who can establish that the producer is participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs intended to increase consumption of milk and dairy products generally shall receive credit in determining the assessment due from such producer for contributions to such programs of up to 10 cents per hundredweight of milk marketed or, for the period ending six months after November 29, 1983, up to the aggregate rate in effect on November 29, 1983, of such contributions to such programs (but not to exceed 15 cents per hundredweight of milk marketed) if such aggregate rate exceeds 10 cents per hundredweight of milk marketed.
>
> (5) Any person marketing milk of that person's own production directly to consumers shall remit the assessment directly to the Board in the manner prescribed by the order.

7 U.S.C. § 4504(g). The Secretary issued an order in accordance with the Stabilization Act adopting the substance of the provisions listed above. *See* C.F.R. § 1150.152(a), (b) (requiring producers of milk to pay an assessment of 15 cents to the Dairy Board for each hundredweight of milk marketed commercially). It is these provisions of the Act whose constitutionality are currently under review.

The Dairy Board is empowered to use funds collected through the assessments in order to fulfill its obligations under the Act. *See* 7 U.S.C.§ 4504(f); *see also* 7 C.F.R.§ 1150.140(i). None of these funds may, however, be utilized "in any manner for the purpose of in-

fluencing governmental policy or action" except insofar as those funds are used to make recommendations to the Secretary regarding proposed amendments to the Dairy Order. *See* 7 U.S.C.§ 4504(j); *see also* 7 C.F.R. § 1150.154.

In 1994, the Dairy Board joined with the United Dairy Industry Association ("UDIA"), a federation of Qualified Programs, in order to create Dairy Management Inc. ("DMI"), a District of Columbia corporation. (Gov. Defs.' Br. Supp. Summ. J., Ex. C ¶ 1). The Dairy Board and UDIA "develop [ ] their marketing plans and programs through DMI."[2] (Gov. Defs.' Br. Supp. Summ. J., Ex. B at 9). The DMI Board consists of an equal number of dairy farmers from the Dairy Board and the UDIA Board. *Id.* "The goals of DMI are to reduce administrative costs, to have a larger impact on the consumer, and to be better able to drive demand and help increase human consumption of fluid milk and dairy products." *Id.* All advertising created by DMI requires the approval of Dairy Programs, a component of AMS, prior to its dissemination to the public. *See* Mengel Decl. ¶¶ 2-3.

Plaintiffs operate a dairy farm in Tioga County, Pennsylvania,[3] where they produce milk for commercial

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[2] In the year 2000, DMI's program of generic promotion included "a full year of fluid milk print advertising through the Milk Mustache/got milk? ® campaign." (Gov. Defs.' Br. Supp. Summ. J., Ex. B at 21).

[3] A total of eleven federal marketing orders exist for milk. (Gov. Defs.' Br. Supp. Summ. J., Ex. L at 1). Plaintiffs emphasize, however, that Tioga County is not covered by a milk marketing order. *See* Compl. at ¶ 6; *see also* 7 C.F.R. §§ 1001.2, 1033.2. Still, the fact remains that "handlers regulated under [f]ederal milk orders process about 75 percent of all the milk marketed in the

use. They are subject to the Dairy Program's assessment, which costs them approximately $3,500 to $4,000 per year. *See* Cochran Decl. ¶ 8.

The Cochrans operate their dairy farm autonomously using traditional farming methods. They are not members of any dairy cooperative. *See* Compl. ¶ 25. They believe "that the use of sustainable agriculture in the form of less intensive herd management and grazing system makes for a superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and our planet." Cochran Decl. ¶ 10. Based upon the perceived differences in the farming methods used by the Cochrans and dairy producers at-large, the Cochrans object to the promotion of milk generically as "speech that denies there is any difference in milk." *Id.* ¶ 13.

LEGAL ANALYSIS

Our holding hinges upon a determination of whether the facts in this case more closely parallel those in *Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), or in *United States* v. *United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L.Ed.2d 438 (2001).

U.S." (Gov. Defs.' Br. Supp. Summ. J., Ex. K at 2). Indeed, "[i]n total, more than 96 percent of the fluid eligible milk produced in the United States is priced under a state or federal marketing order." Second Mengel Decl. ¶ 2. Still the fact remains that "handlers regulated under [f]ederal milk orders process about 75 percent of all the milk marketed in the U.S." (Gov. Defs' Br. Supp. Summ. J., Ex. K at 2). Indeed, "[i]n total, more than 96 percent of the fluid eligible milk produced in the United Sates is riced under federal marketing order." Second Mengel Dec. ¶ 2.

In *Wileman*, producers of California tree fruits (including nectarines, plums, and peaches) challenged the constitutionality of regulations contained in marketing orders promulgated by the Secretary of Agriculture which imposed assessments on the producers to cover costs associated with the orders, including generic advertising. *See Wileman*, 521 U.S. at 460, 117 S. Ct. 2130. The United States Supreme Court framed the issue before it succinctly: "whether being compelled to fund this advertising raises a First Amendment issue . . . to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve." *Id.* at 468, 117 S.Ct. 2130. In deciding upon the latter, the Supreme Court placed emphasis upon the fact that

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 469, 117 S. Ct. 2130. In conjunction with the applicable statutory scheme, the Court noted three critical characteristics about the marketing orders in effect:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic

> speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

Id. at 469-70, 117 S. Ct. 2130. On these grounds, the Supreme Court concluded that the regulation at issue would properly be judged under the standard of review appropriate for economic regulations rather than under the heightened scrutiny applicable to First Amendment issues. *Id.* at 469-70, 117 S.Ct. 2130.

Several terms later, in *United Foods*, the Supreme Court considered a challenge to the constitutionality of a statute mandating the issuance of assessments on handlers of fresh mushrooms in order to fund advertising for their products. *See United Foods*, 533 U.S. at 408, 121 S. Ct. 2334. In finding that the First Amendment was violated, the Supreme Court outlined the fundamental difference between the facts before it in *United Foods* and those before it in *Wileman*:

> In [*Wileman*] the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

Id. at 411-12, 121 S. Ct. 2334. More specifically, the Supreme Court observed that the rationale of the holding in *Wileman* was premised upon the fact that the nectarine and peach producers "were bound together and required by the statute to market their products according to cooperative rules," and that "their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation." *Id.*

at 412, 121 S. Ct. 2334. In the case of mushroom handlers, on the other hand, no comparable regulatory scheme existed: there were no marketing orders in place regulating the production and sale of mushrooms, no exemption existed for mushroom producers from antitrust laws, and no encroachments existed upon the ability individual mushroom producers to make their own marketing decisions. *Id.* at 412, 121 S. Ct. 2334. In fact, the only regulations affecting mushroom producers were the mandatory assessments which were instituted for the sole purpose of creating and funding generic advertising for mushrooms. *Id.* Therefore, the Court concluded that there was no support for the proposition that the compelled contributions for advertising were part of a broader regulatory scheme whereby the statute would be appropriately relegated to the standard of review applicable to economic regulations as applied in *Wileman*.[4] *Id.* at 415, 121 S. Ct. 2334. Instead, the Supreme Court analyzed the assessments under the standard of review appropriate for First Amendment issues and ultimately determined that the assessments were impermissible intrusions upon the mushroom handlers' First Amendment rights. *Id.* at 416, 121 S. Ct. 2334.

Based upon the aforementioned decades of regulations affecting the milk industry and milk producers

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[4] Quoting the Court of Appeals opinion in the case, the Supreme Court recognized that "'[t]he mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program,' and 'the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply.'" *United Foods*, 533 U.S. at 412, 121 S.Ct. 2334 (quoting *United Foods, Inc.* v. *United States*, 197 F.3d 221, 221, 223 (6th Cir. 1999)).

in particular, we conclude that Section 4504(g) of the Stabilization Act is part of a larger regulatory scheme affecting the sale and production of milk.[5] On this basis, we find that milk producers are regulated to a similar degree as were the tree fruit growers in *Wileman* and that "the mandated assessments for speech [are] ancillary to a more comprehensive program restricting marketing autonomy."[6] *United Foods*, 533 U.S. at 411, 121 S. Ct. 2334.

The remainder of our analysis will accordingly be devoted to whether or not the provisions of the Stabilization Act at issue in this case pass the three part test set out by the Supreme Court in *Wileman*. *See Wileman*, 521 U.S. at 469-70, 117 S. Ct. 2130.

a. Whether Section 4504(g) of the Stabilization Act imposes a restraint on the freedom to communicate.

Neither Section 4504(g) of the Stabilization Act, nor any other provision within the Act that we are aware of, imposes a restraint on the Cochrans' (or any other milk producer's) freedom to communi-

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[5] We note, for the sake of clarity and completeness, that in making this determination we have considered the entire regulatory scheme applicable to milk producers as opposed to limiting our analysis to the Stabilization Act alone. *See Gallo Cattle Company* v. *California Milk Advisory Board*, 185 F.3d 969 (9th Cir. 1999) (where the court considered the entire regulatory scheme affecting milk producers rather than limiting its review to the single milk marketing order being challenged in that case).

[6] We believe that there can be no dispute that milk producers are regulated to a far greater extent than were the mushroom growers in *United Foods*.

cate any message they desire to any audience whatsoever.[7]

b. Whether Section 4504(g) of the Stabilization Act compels any person to engage in any actual or symbolic speech.

Section 4504(g) does not compel the Cochrans to engage in any actual or symbolic speech. The mandatory assessments charged to the Cochrans and other milk producers pursuant to the Act, although used to subsidize the generic advertising of milk, are not considered to be "compelled speech."[8] *See Gallo*, 185 F.3d at 976 (citing *Wileman*, 521 U.S. at 470-72, 117 S. Ct. 2130). Moreover, the generic advertisements funded by the assessments are attributed to the National Dairy Promotion Board rather than to the Cochrans or any other individual dairy producers. *See* 7 U.S.C. § 4504(c).

c. Whether Section 4504(g) of the Stabilization Act compels dairy producers to endorse or finance any political or ideological views.

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[7] The fact that the assessments "may indirectly lead to a reduction in a [dairy producer's] individual advertising budget does not itself amount to a restriction on speech." *Wileman*, 521 U.S. at 470, 117 S.Ct. 2130.

[8] This is because "[t]he use of assessments to pay for advertising does not require [the Cochrans] to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message." *Wileman*, 521 U.S. at 470-471, 117 S. Ct. 2130 (internal citations and quotations omitted).

Pursuant to the provisions of the Stabilization Act, the Cochrans are obligated to finance advertisements which contain messages to which they object. Specifically, the Cochrans assert that they disagree with the promotion of milk generically as "speech that denies there is any difference in milk."[9] Cochran Decl. ¶ 13.

For the sake of deciding upon the pending motions, we assume without holding that the Cochrans' objections are ideological in their nature.

"[A]ssessments to fund a lawful collective program may sometimes be used to pay for [ideological] speech over the objection of some members of the group," *Wileman*, 521 U.S. at 472-3, 117 S. Ct. 2130, but only if the advertising funded by those assessments is "germane to the purposes for which compelled association [is] justified." *See id.* at 473, 117 S. Ct. 2130; *see also Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 203, 235-36 (1977); *Gallo*, 185 F.3d at 976.

The Stabilization Act was conceived of as a means of creating "a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products." 7 U.S.C. § 4501(b). "Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market." *Wileman*, 521 U.S. at 476, 117 S. Ct. 2130. There can be no doubt if

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[9] At oral argument, the Cochrans asserted additional, albeit somewhat imprecise, objections to the content of the advertisements: that the Cochrans prefer more traditional farming methods than those employed by the majority of milk producers and that advertisements may be deemed to promote sexually explicit messages.

the relevant advertising is effective in that it increases the demand for milk, it will have furthered the articulated objectives of the Act. Therefore, we hold that the creation of a generic advertising campaign for milk is germane to the declared purposes of the Stabilization Act.[10]

CONCLUSION:

It became clear to the Court at oral argument that despite Plaintiffs' efforts to frame their argument within the ambit of the *United Foods* and *Wileman* continuum of cases, in reality Plaintiffs are urging this Court to embrace and apply Justice Souter's dissenting opinion in *Wileman* to the case at bar.[11] To follow Justice Souter's position would necessarily entail applying a standard of review contrary to the holding of *Wileman*. As a district court, we are bound to apply the law of the land in a manner consistent with

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[10] It is worth noting that Plaintiffs do not assert that the advertising at issue is in any way false or deceptive. In this regard, Plaintiffs' imprecise "criticisms of generic advertising provide no basis for concluding that factually accurate advertising constitutes an abridgment of anybody's right to speak freely." *Wileman*, 521 U.S. at 474, 117 S. Ct. 2130.

[11] Justice Souter would "adhere to the principle laid down in our compelled-speech cases: laws requiring an individual to engage in or pay for expressive activities are reviewed under the same standard that applies to laws prohibiting one from engaging in or paying for such activities. Under the test for commercial speech, the law may be held constitutional only if (1) the interest being pursued by the government is substantial, and (2) the regulation direction advances that interest and (3) is narrowly tailored to serve it." *Wileman*, 521 U.S. at 491 (SOUTER, J., dissenting).

Supreme Court jurisprudence. We will not, therefore, disregard controlling precedent.[12]

Accordingly, we find that Section 4504(g) of the Stabilization Act is a species of economic regulation that does not infringe upon the First Amendment rights of the Cochrans. We will deny Plaintiffs' Motion for Summary Judgment and grant both the Governmental Defendants' and the Intervenors' motions for summary judgment.

NOW THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' Motion for Summary Judgment (doc. 2) is denied.

2. The Governmental Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (doc. 9) is granted.

3. The Intervenors' Motion for Summary Judgment (doc. 45) is granted.

4. Plaintiffs' Motion for Leave to Supplement the Record (doc. 62) is granted.

5. The Clerk is directed to close the file on the case.

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[12] Cognizant that we may be stating the obvious, our holding should be considered apart from any perceived appraisal on our part as to the benefits or harms arising out of the imposition of a generic advertising program funded by assessments charged to milk producers pursuant to the Stabilization Act. Reasonable people can and do differ as to the virtues of such a scheme.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-2522

JOSEPH S. COCHRAN; BRENDA S. COCHRAN,
APPELLANTS

v.

ANN VENEMAN, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE; NATIONAL DAIRY PROMOTION BOARD

FRED LOVELL; LEE GREENWALT; JACKIE ROOT; EARNEST NORMAN; STEPHEN MASHALL; CECIL MOYER; JAMES VANBLARCOM
INTERVENOR/DEFENDANTS IN D.C.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 02-cv-00529)
District Judge: The Honorable John E. Jones

Submitted under Third Circuit LAR 34.1(a)
January 12, 2004

Before: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER and ALDISERT[*], Circuit Judges

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[*] Judge Aldisert's vote was limited to panel rehearing only.

SUR PETITION FOR REHEARING AND REHEARING EN BANC

The petition for Rehearing filed by [Appellants] and the Petition for Rehearing on behalf of the Intervenors having been submitted to the judges who participated in the decision of this Court, and to all other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

BY THE COURT

RUGGERO J. ALDISERT
Circuit Judge

DATED: May 3, 2004
CLW/cc: Walter T. Grabowski, Esq.
Steven M. Simpson, Esq.
Douglas N. Letter, Esq.
Matthew M. Collette, Esq.
Richard T. Rossier, Esq.
Alex Menendez, Esq.

APPENDIX D

SUBCHAPTER I—DAIRY PROMOTION PROGRAM

§ 4501. Congressional findings and declaration of policy

(a) Congress finds that—

(1) dairy products are basic foods that are a valuable part of the human diet;

(2) the production of dairy products plays a significant role in the Nation's economy, the milk from which dairy products are manufactured is produced by thousands of milk producers, and dairy products are consumed by millions of people throughout the United States;

(3) dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;

(4) the maintenance and expansion of existing markets for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation; and

(5) dairy products move in interstate and foreign commerce, and dairy products that do not move in such channels of commerce directly burden or affect interstate commerce of dairy products.

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing

(through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products. Nothing in this subchapter may be construed to provide for the control of production or otherwise limit the right of individual milk producers to produce milk or the right of any person to import dairy products.

4502. Definitions

As used in this subchapter—

(a) the term "Board" means the National Dairy Promotion and Research Board established under section 4504 of this title;

(b) the term "Department" means the Department of Agriculture;

(c) the term "Secretary" means the Secretary of Agriculture;

(d) the term "milk" means any class of cow's milk;

(e) the term "dairy products" means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products;

(f) the term "fluid milk products" means those milk products normally consumed in liquid form as a beverage;

(g) the term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity;

(h) the term "producer" means any person engaged in the production of milk for commercial use;

(i) the term "promotion" means actions such as paid advertising, sales promotion, and publicity to advance the image and sales of and demand for dairy products;

(j) the term "research" means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for milk and dairy products;

(k) the term "nutrition education" means those activities intended to broaden the understanding of sound nutritional principles including the role of milk and dairy products in a balanced diet;

(l) the term "United States" as used in sections 4501 through 4508 of this title means the forty-eight contiguous States in the continental United States;

(m) The term "imported dairy product" means any dairy product that is imported into the United States (as defined in subsection (l) of this section), including dairy products imported into the United States in the form of

(1) milk, cream, and fresh and dried dairy products;

(2) butter and butterfat mixtures;

(3) cheese; and

(4) casein and mixtures;

(n) the term "importer" means a person that imports an imported dairy product into the United States; and

(o) the term "Customs" means the United States Customs Service.

§ 4503. Issuance of orders

(a) Notice and opportunity for public comment

During the period beginning with November 29, 1983, and ending thirty days after receipt of a proposal for an initial dairy products promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment upon the proposed order. The proposal for an order may be submitted by an organization certified under Section 4505 of this title or by any interested person affected by the provisions of this subchapter.

(b) Effective date of orders

After notice and opportunity for public comment are given, as provided for in subsection (a) of this section, the Secretary shall issue a dairy products promotion and research order. Such order shall become effective not later than ninety days following publication of the proposal.

(c) Amendment of orders

The Secretary may, from time to time, amend a dairy products promotion and research order.

(d) Order implementation and international trade obligations

The Secretary, in consultation with the United States Trade Representative, shall ensure that the order is implemented in a manner consistent with the international trade obligations of the Federal Government.

§ 4504. Required terms in orders

Any order issued under this subchapter shall contain terms and conditions as follows:

(a) The order shall provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for nutrition education projects, and for the disbursement of necessary funds for such purposes. Any such plan or project shall be directed toward the sale and marketing or use of dairy products to the end that the marketing and use of dairy products may be encouraged, expanded, improved, or made more acceptable. No such advertising or sales promotion program shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

(b) National Dairy Promotion and Research Board

(1) The order shall provide for the establishment and appointment by the Secretary of a National Dairy Promotion and Research Board that shall consist of not less than thirty-six members.

(2) Except as provided in paragraph (6), the members of the Board shall be milk producers appointed by the Secretary from nominations submitted by eligible organizations certified under section 4505 of this title, or, if the Secretary determines that a substantial number of milk producers are not members of, or their interests are not represented by, any such eligible organization, then from nominations made by such milk producers in the manner authorized by the Secretary.

(3) In making such appointments, the Secretary shall take into account, to the extent practicable, the geographical distribution of milk production volume throughout the United States.

(4) In determining geographic representation, whole States shall be considered as a unit.

(5) A region may be represented by more than one director and a region may be made up of more than one State

(6) Importers

(A) Initial representation

In making initial appointments to the Board of importer representatives, the Secretary shall appoint 2 members who represent importers of dairy products and are subject to assessments under the order.

(B) **Subsequent representation**

At least once every 3 years after the initial appointment of importer representatives under subparagraph (A), the Secretary shall review the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous 3 years and, on the basis of that review, shall reapportion importer representation on the Board to reflect the proportional share of the United States market by domestic production and imported dairy products.

(C) Additional members; nominations

The members appointed under this paragraph—

(i) shall be in addition to the total number of members appointed under paragraph (2); and

(ii) shall be appointed from nominations submitted by importers under such procedures as the Secretary determines to be appropriate.

(7) The term of appointment to the Board shall be for three years with no member serving more than two consecutive terms, except that initial appointments shall be proportionately for one-year, two-year, and three-year terms.

(8) The Board shall appoint from its members an executive committee whose membership shall equally reflect each of the different regions in the United States in which milk is produced as well as importers of dairy products.

(9) The executive committee shall have such duties and powers as are conferred upon it by the Board.

(10) Board members shall serve without compensation, but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Board including a per diem allowance as recommended by the Board and approved by the Secretary.

(c) The order shall define the powers and duties of the Board that shall include only the powers enumerated in this section. These shall include, in addition to the powers set forth elsewhere in this section, the powers to (1) receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of

fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals, (2) administer the order in accordance with its terms and provisions, (3) make rules and regulations to effectuate the terms and provisions of the order, (4) receive, investigate, and report to the Secretary complaints of violations of the order, and (5) recommend to the Secretary amendments to the order. The Board shall solicit, among others, research proposals that would increase the use of fluid milk and dairy products by the military and by persons in developing nations, and that would demonstrate the feasibility of converting surplus nonfat dry milk to casein for domestic and export use.

(d) The order shall provide that the Board shall develop and submit to the Secretary for approval any promotion, research, or nutrition education plan or project and that any such plan or project must be approved by the Secretary before becoming effective.

(e) Budgets

(1) Preparation and submission

The order shall require the Board to submit to the Secretary for approval budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of the order, including projected costs of dairy products promotion and research projects.

(2) Foreign market efforts

The order shall authorize the Board to expend in the maintenance and expansion of foreign markets an amount not to exceed the amount collected from United States producers for a fiscal year. Of those funds, for each of the 2002 through 2007 fiscal years, the Board's budget may provide for the expenditure of revenues available to the Board to develop international markets for, and to promote within such markets, the consumption of dairy products produced or manufactured in the United States.

(f) The order shall provide that the Board, with the approval of the Secretary, may enter into agreements for the development and conduct of the activities authorized under the order as specified in subsection (a) of this section and for the payment of the cost thereof with funds collected through assessments under the order. Any such agreement shall provide that (1) the contracting party shall develop and submit to the Board a plan or project together with a budget or budgets that shall show estimated costs to be incurred for such plan or project, (2) the plan or project shall become effective upon the approval of the Secretary, and (3) the contracting party shall keep accurate records of all of its transactions, account for funds received and expended, and make periodic reports to the Board of activities conducted, and such other reports as the Secretary or the Board may require.

(g) Assessments

(1) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.

(2) The assessment shall be used for payment of the expenses in administering the order, with provision for a reasonable reserve, and shall include those administrative costs incurred by the Department after an order has been promulgated under this subchapter.

(3) The rate of assessment for milk produced in the United States and imported dairy products prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as determined by the Secretary.

(4) A milk producer or the producer's cooperative who can establish that the producer is participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs intended to increase consumption of milk and dairy products generally shall receive credit in determining the assessment due from such producer for contributions to such programs of up to 10 cents per hundredweight of milk marketed or, for the period ending

six months after November 29, 1983, up to the aggregate rate in effect on November 29, 1983 of such contributions to such programs (but not to exceed 15 cents per hundredweight of milk marketed) if such aggregate rate exceeds 10 cents per hundredweight of milk marketed.

(5) Any person marketing milk of that person's own production directly to consumers shall remit the assessment directly to the Board in the manner prescribed by the order.

(6) Importers

(A) In general

The order shall provide that each importer of imported dairy products shall pay an assessment to the Board in the manner prescribed by the order.

(B) Time for payment

The assessment on imported dairy products shall be paid by the importer to Customs at the time the entry documents are filed with Customs. Customs shall remit the assessments to the Board. For purposes of this subparagraph, the term 'importer' includes persons who hold title to foreign-produced dairy products immediately upon release by Customs, as well as persons who act on behalf of others, as agents, brokers, or consignees, to secure the release of dairy products from Customs.

(C) Use of assessments on imported dairy products

Assessments collected on imported dairy products shall not be used for foreign market promotion.

(h) The order shall require the Board to (1) maintain such books and records (which shall be available to the Secretary for inspection and audit) as the Secretary may prescribe, (2) prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe, and (3) account for the receipt and disbursement of all funds entrusted to it.

(i) The order shall provide that the Board, with the approval of the Secretary, may invest, pending disbursement under a plan or project, funds collected through assessments authorized under this subchapter, only in obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

(j) The order shall prohibit any funds collected by the Board under the order from being used in any manner for the purpose of influencing governmental policy or action except as provided by subsection (c)(5) of this section.

(k) The order shall require that each importer of imported dairy products, each person receiving milk

from farmers for commercial use, and any person marketing milk of that person's own production directly to consumers, maintain and make available for inspection such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order. Such information shall be made available to the Secretary as is appropriate to the administration or enforcement of this subchapter, or any order or regulation issued under this subchapter. All information so obtained shall be kept confidential by all officers and employees of the Department, and only such information so obtained as the Secretary deems relevant may be disclosed by them and then only in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving the order with reference to which the information to be disclosed was obtained. Nothing in this subsection may be deemed to prohibit (1) the issuance of general statements, based upon the reports, of the number of persons subject to an order or statistical data collected therefrom, which statements do not identify the information furnished by any person, or (2) the publication, by direction of the Secretary, of the name of any person violating any order, together with a statement of the particular provisions of the order violated by such person. No information obtained under the authority of this subchapter may be made available to any agency or officer of the Federal Government for any purpose other than the implementation of this subchapter and any investigatory or enforcement action necessary for the implementation of this subchapter. Any person

violating the provisions of this subsection shall, upon conviction, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or both, and, if an officer or employee of the Board or the Department, shall be removed from office.

(l) The order shall provide terms and conditions, not inconsistent with the provisions of this subchapter, as necessary to effectuate the provisions of the order.

§ 4505. Certification of organizations

(a) The eligibility of any organization to represent milk producers, and to participate in the making of nominations under section 4504 of this title shall be certified by the Secretary. The Secretary shall certify any organization that the Secretary determines meets the eligibility criteria established by the Secretary under this section and the Secretary's determination as to eligibility shall be final.

(b) Certification shall be based, in addition to other available information, on a factual report submitted by the organization, which shall contain information deemed relevant and specified by the Secretary, including, but not limited to, the following:

(1) geographic territory covered by the organization's active membership;

(2) nature and size of the organization's active membership including the proportion of the total number of active milk producers represented by the organization;

(3) evidence of stability and permanency of the organization;

(4) sources from which the organization's operating funds are derived;

(5) functions of the organization; and

(6) the organization's ability and willingness to further the aims and objectives of this subchapter.

The primary considerations in determining the eligibility of an organization shall be whether its membership consists primarily of milk producers who produce a substantial volume of milk and whether the primary or overriding interest of the organization is in the production or processing of fluid milk and dairy products and promotion of the nutritional attributes of fluid milk and dairy products.

§ 4506. Requirement of referendum

(a) Within the sixty-day period immediately preceding September 30, 1985, the Secretary shall conduct a referendum among producers who, during a representative period (as determined by the Secretary), have been engaged in the production of milk for commercial use for the purpose of ascertaining whether the order then in effect shall be continued. Such order shall be continued only if the Secretary determines that it has been approved by not less than a majority of the producers voting in the referendum, who during a representative period (as determined by the Secretary) have been engaged in the production of milk for commercial use. If continuation of the order is not approved by a majority of the producers voting in the referendum, the Secretary shall terminate collection of

assessments under the order within six months after the Secretary determines that such action is favored by a majority of the producers voting in the referendum and shall terminate the order in an orderly manner as soon as practicable after such determination.

(b) The Secretary shall be reimbursed from assessments collected by the Board for any expenses incurred by the Department in connection with the conduct of any referendum under this section and section 4507 of this title, except for the salaries of Government employees.

§ 4507. Suspension and termination of orders

(a) Determination by Secretary

After September 30, 1985, the Secretary shall, whenever the Secretary finds that any order issued under this subchapter or any provision thereof obstructs or does not tend to effectuate the declared policy of this subchapter, terminate or suspend the operation of such order or such provisions thereof.

(b) Referendum

After September 30, 1985, the Secretary may conduct a referendum at any time, and shall hold a referendum on request of a representative group comprising 10 per centum or more of the number of producers and importers subject to the order, to determine whether the producers and importers favor the termination or suspension of the order. The Secretary shall suspend or terminate collection of assessments under the order within six months after the Secretary determines that suspension or termination of the order is favored by a majority of the producers voting in the referendum who, during a

representative period (as determined by the Secretary), have been engaged in the production of milk for commercial use and importers voting in the referendum (who have been engaged in the importation of dairy products during the same representative period, as determined by the Secretary) and shall terminate the order in an orderly manner as soon as practicable after such determination.

(c) Action not considered an order

The termination or suspension of any order, or any provision thereof, shall not be considered an order within the meaning of this subchapter.

§ 4508. Cooperative association representation

Whenever, under the provisions of this subchapter, the Secretary is required to determine the approval or disapproval of producers, the Secretary shall consider the approval or disapproval by any cooperative association of producers, engaged in a bona fide manner in marketing milk or the products thereof, as the approval or disapproval of the producers who are members of or under contract with such cooperative association of producers. If a cooperative association of producers elects to vote on behalf of its members, such cooperative association shall provide each producer, on whose behalf the cooperative association is expressing approval or disapproval, a description of the question presented in the referendum together with a statement of the manner in which the cooperative association intends to cast its vote on behalf of the membership. Such information shall inform the producer of procedures to follow to cast an individual ballot should the producer so choose within the period of time established by the Secretary for casting ballots. Such

notification shall be made at least thirty days prior to the referendum and shall include an official ballot. The ballots shall be tabulated by the Secretary and the vote of the cooperative association shall be adjusted to reflect such individual votes.

§ 4509. Petition and review

(a) Any person subject to any order issued under this subchapter may file with the Secretary a petition stating that any such order or any provision of such order or any obligation imposed in connection therewith is not in accordance with law and requesting a modification thereof or an exemption therefrom. The petitioner shall thereupon be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary. After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

(b) The district courts of the United States in any district in which such person is an inhabitant or carries on business are hereby vested with jurisdiction to review such ruling, if a complaint for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had on the Secretary by delivering a copy of the complaint to the Secretary. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

§ 4510. Enforcement

(a) Restraining order; civil action; minor violation

The district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order or regulation made or issued under this subchapter. Any civil action authorized to be brought under this subsection shall be referred to the Attorney General for appropriate action, except that the Secretary is not required to refer to the Attorney General minor violations of this subchapter whenever the Secretary believes that the administration and enforcement of this subchapter would be adequately served by suitable written notice or warning to any person committing such violation.

(b) Civil penalties

Any person who willfully violates any provision of any order issued by the Secretary under this subchapter shall be assessed a civil penalty by the Secretary of not more than $1,000 for each such violation and, in the case of a willful failure to pay, collect, or remit the assessment as required by the order, in addition to the amount due, a penalty equal to the amount of the assessment on the quantity of milk as to which the failure applies. The amount of any such penalty shall accrue to the United States and may be recovered in a civil suit brought by the United States.

(c) Availability of other remedies

The remedies provided in subsections (a) and (b) of this section shall be in addition to, and not exclusive of, other remedies that may be available.

§ 4511. Investigations; power to subpena and take oaths and affirmations; aid of courts

The Secretary may make such investigations as the Secretary deems necessary for the effective administration of this subchapter or to determine whether any person subject to the provisions of this subchapter has engaged or is about to engage in any act that constitutes or will constitute a violation of any provision of this subchapter or of any order, or rule or regulation issued under this subchapter. For the purpose of such investigation, the Secretary may administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpena to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of records. The court may issue an order requiring such person to appear before the Secretary to produce records or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. Process in any such case may be served in the judicial district in which such person is an inhabitant or wherever such person may be found.

§ 4512. Administrative provisions

(a) Nothing in this subchapter may be construed to preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State.

(b) The provisions of this subchapter applicable to orders shall be applicable to amendments to orders.

§ 4513. Authorization of appropriations

There are hereby authorized to be appropriated such funds as are necessary to carry out the provisions of this subchapter. The funds so appropriated shall not be available for payment of the expenses or expenditures of the Board in administering any provisions of any order issued under the terms of this subchapter.

§ 4514. Dairy reports

The Secretary of Agriculture shall submit to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry the following reports:

(1) Not later than July 1, 1984, a report on the effect of applying, nationally, standards similar to the current California standards for fluid milk products in their final consumer form, as they would relate to—

(A) consumer acceptance, overall consumer consumption trends, and total per capita consumption;

(B) nutritional augmentation, particularly for young and older Americans;

(C) implementing improved interagency enforcement of minimum standards to prevent consumer fraud and deception;

(D) multiple component pricing for producer milk;

(E) reduced Commodity Credit Corporation purchases;

(F) consistency of product quality throughout the year and between marketing regions of the United States; and

(G) consumer prices.

(2) Not later than December 31, 1984, a report on (A) recommendations for changes in the application of the parity formula to milk so as to make the formula more consistent with modern production methods and with special attention to the cost of producing milk as a result of changes in productivity, and (B) the feasibility of imposing a limitation on the total amount of payments and other assistance a producer of milk may receive during a year under section 1446(d) of this title.

(3) Not later than April 15, 1985, a report on the effectiveness of the paid diversion program carried out under section 1446(d) of this title.

(4) Not later than July 1, 1985, and July 1 of each year after the date of enactment of this title,[1] an annual report describing activities conducted under the dairy products promotion and research order issued under this subchapter, and accounting for the receipt and disbursement of all funds

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[1] See Reference in Text note below.

received by the National Dairy Promotion and Research Board under such order including an independent analysis of the effectiveness of the program.

SUBCHAPTER II—DAIRY RESEARCH PROGRAM

§ 4531. Definitions

For purposes of this subchapter—

(1) the term "board" means the board of trustees of the Institute;

(2) the term "Department" means the Department of Agriculture;

(3) the term "dairy products" means manufactured products that are derived from the processing of milk, and includes fluid milk products;

(4) the term "fluid milk products" means those milk products normally consumed in liquid form as a beverage;

(5) the term "Fund" means the Dairy Research Trust Fund established by section 4536 of this title;

(6) the term "Institute" means the National Dairy Research Endowment Institute established by section 4532 of this title;

(7) the term "milk" means any class of cow's milk marketed in the United States;

(8) the term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity;

(9) the term "producer" means any person engaged in the production of milk for commercial use;

(10) the term "research" means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for milk and dairy products;

(11) the term "Secretary" means the Secretary of Agriculture unless the context specifies otherwise; and

(12) the term "United States" means the several States and the territories and possessions of the United States, except that for purposes of sections 4532, 4534(a), and 4537 of this title, and paragraph (7) of this section, such term means the forty-eight contiguous States in the continental United States.

§ 4532. Establishment of National Dairy Research Endowment Institute

The Secretary of Agriculture may establish in the Department of Agriculture a National Dairy Research Endowment Institute whose function shall be to aid the dairy industry through the implementation of the dairy products research order, which its board of trustees shall administer, and the use of monies made available to its board of trustees from the Dairy Research Trust Fund to implement the order. In implementing the order, the Institute shall provide a permanent system for funding scientific research activities designed to facilitate the expansion of markets for milk and dairy

products marketed in the United States. The Institute shall be headed by a board of trustees composed of the members of the National Dairy Promotion and Research Board. The board may appoint from among its members an executive committee whose membership shall reflect equally each of the different regions in the United States in which milk is produced. The executive committee shall have such duties and powers as are delegated to it by the board. The members of the board shall serve without compensation. While away from their homes or regular places of business in the performance of services for the board, members of the board shall be allowed reasonable travel expenses, including a per diem allowance in lieu of subsistence, as recommended by the board and approved by the Secretary, except that there shall be no duplication of payment for such expenses.

§ 4533. Issuance of order

(a) Publication in Federal Register; public comment; submission

After receipt of a proposed dairy products research order, the Secretary may publish such proposed order in the Federal Register and shall give notice and reasonable opportunity for public comment on such proposed order. Such proposed order may be submitted by an organization certified under section 4505 of this title or by any interested person affected by the provisions of subchapter I of this chapter.

(b) Effective date of order

After the Secretary provides for such publication and a reasonable opportunity for a hearing under subsection (a) of this section, the Secretary may issue the dairy products research order. The order so issued shall

become effective not later than 90 days after publication in the Federal Register of the order.

(c) Amendment of order

The Secretary may amend, from time to time, the dairy products research order issued under subsection (b) of this section.

§ 4534. Required terms of order; agreements under order; records

(a) Required terms

The dairy products research order issued under section 4533(b) of this title shall—

(1) provide for the establishment and administration, by the Institute, of appropriate scientific research activities designed to facilitate the expansion of markets for dairy products marketed in the United States;

(2) specify the powers of the board, including the powers to—

(A) receive and evaluate, or on its own initiative develop and budget for, research plans or projects designed to—

(i) increase the knowledge of human nutritional needs and the relationship of milk and dairy products to these needs;

(ii) improve dairy processing technologies, particularly those appropriate to small- and medium-sized family farms;

(iii) develop new dairy products; and

(iv) appraise the effect of such research on the marketing of dairy products;

(B) make recommendations to the Secretary regarding such plans and projects;

(C) administer the order in accordance with its terms and provisions;

(D) make rules and regulations to effectuate the terms and provisions of the order;

(E) receive, investigate, and report to the Secretary complaints of violations of the order;

(F) recommend to the Secretary amendments to the order;

(G) enter into agreements, with the approval of the Secretary, for the conduct of activities authorized under the order and for payment of the cost of such activities with any monies in the Fund other than monies appropriated or transferred by the Secretary to the Fund;

(H) with the approval of the Secretary, establish advisory committees composed of individuals other than members of the board, and pay the necessary and reasonable expenses and fees of the members of such committees; and

(I) with the approval of the Secretary, appoint or employ such persons, other than members of the board, as the board deems necessary and define the duties and determine the compensation of each;

(3) specify the duties of the board, including the duties to—

(A) develop, and submit to the Secretary for approval before implementation,

any research plan or project to be carried out under this subchapter;

(B) submit to the Secretary for approval, budgets, on a fiscal year basis, of the board's anticipated expenses and disbursements in the administration of the order, including projected costs of carrying out dairy products research plans and projects;

(C) prepare and make public, at least annually, a report of the board's activities and an accounting for funds received and expended by the board;

(D) maintain such books and records (which shall be available to the Secretary for inspection and audit) as the Secretary may prescribe;

(E) prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe; and

(F) account for the receipt and disbursement of all funds entrusted to the board;

(4) prohibit any monies received under this subchapter by the board to be used in any manner for the purpose of influencing governmental policy or actions, except as provided in paragraph (2)(F); and

(5) require that each person receiving milk from producers for commercial use and any person marketing milk of that person's own production directly to consumers maintain and make available for inspection by the Secretary such books and records as may be required by the order and file with the Secretary reports at the time, in the manner, and having the content prescribed by the order.

(b) Agreements under order

Any agreement made under subsection (a)(2)(G) of this section shall provide that—

(1) the person with whom such agreement is made shall develop and submit to the board a research plan or project together with a budget that shows estimated costs to be incurred to carry out such plan or project;

(2) such plan or project shall become effective on the approval of the Secretary; and

(3) such person shall keep accurate records of all of its transactions, account for funds received and expended, make periodic reports to the board of activities conducted to carry out such plan or project, and submit such other reports as the Secretary or the board may require.

(c) Confidentiality of records; disclosure exceptions; penalty for violation

(1) Information, books, and records made available to, and reports filed with, the Secretary under subsection (a)(6) of this section shall be kept confidential by all officers and employees of the Department, except that such information, books, records, and reports as the Secretary deems relevant may be disclosed by such officers and employees in any suit or administrative proceeding that is brought at the request of the Secretary or to which the Secretary or any officer of the United States is a party, and that involves the order issued under section 4533(b) of this title.

(2) Paragraph (1) shall not be construed to prohibit—

> **(A)** the issuance of general statements, based on such information, books, records, and reports, of the number of persons subject to the order or of statistical data collected from such persons if such statements do not specifically identify the data furnished by any one of such persons; or
>
> **(B)** the publication, at the direction of the Secretary, of the name of any person violating the order, together with a statement of the particular provisions of the order violated by the person.

(3) No information obtained under the authority of this section may be made available to any agency, officer, or employee of the United States for any purpose other than the implementation of this subchapter and any investigatory or enforcement action necessary to implement this subchapter. Any person

who violates this paragraph shall be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or both, and, if such person is employed by the board or the Department, shall be terminated from such employment.

§ 4535. Petition and review; enforcement; investigations

The provisions of sections 4509, 4510, and 4511 of this title shall apply, except when inconsistent with this subchapter, to the Institute, the board, the persons subject to the order issued under section 4533(b) of this title, the jurisdiction of district courts of the United States, and the authority of the Secretary under this subchapter in the same manner as such sections apply with respect to subchapter I of this chapter.

§ 4536. Dairy Research Trust Fund

(a) Establishment

There may be established in the Treasury of the United States a trust fund to be known as the "Dairy Research Trust Fund" if the Institute is established under section 4532 of this title and a dairy products research order issued under section 4533 of this title is effective during such fiscal year.

(b) Authorization of appropriations; transfer of moneys; investments

(1) There is authorized to be appropriated to the Fund or transferred from moneys available to the Commodity Credit Corporation for deposit in the Fund, $100,000,000.

(2) Moneys deposited in the Fund under paragraph (1) shall be invested by the Secretary of the Treasury in obligations of the United States or any

agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States. Interest, dividends, and other payments that accrue from such investments shall be deposited in the Fund and also shall be so invested, subject to subsection (c) of this section.

(c) Availability of moneys for authorized and approved activities

Moneys in the Fund, other than moneys appropriated or transferred under paragraph (1) of subsection (b) of this section, shall be available to the board, in such amounts, and for such activities authorized by this subchapter, as the Secretary may approve.

§ 4537. Termination of order, Institute, and Fund

(a) Termination or suspension of order

The Secretary, whenever the Secretary finds that the order issued under this subchapter or any provision of such order obstructs or does not tend to facilitate the expansion of markets for milk and dairy products marketed in the United States, shall terminate or suspend the operation of the order or such provision.

(b) Dissolution of Institute

If the Secretary terminates the order, the Institute shall be dissolved 180 days after the termination of the order.

(c) Disposal of moneys in Fund

If the Institute is dissolved for any reason, the moneys remaining in the Fund shall be disposed of as shall be agreed to by the board and the Secretary.

§ 4538. Additional authority

(a) No provision of this subchapter shall be construed to preempt or supersede any other program relating to milk or dairy products research organized and operated under the laws of the United States or any State.

(b) The provisions of this subchapter applicable to the order issued under section 4533(b) of this title shall be applicable to any amendment to the order.

APPENDIX E

CODE OF FEDERAL REGULATIONS
TITLE 7 § 1150.101 ACT—AGRICULTURE
SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE
CHAPTER X—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MILK)
PART 1150—DAIRY PROMOTION PROGRAM
SUBPART—DAIRY PROMOTION AND RESEARCH ORDER
DEFINITIONS

Current through September 14, 2004; 69 FR 55361

§ 1150.101 Act.

Act means Title I, Subtitle B, of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, as approved November 29, 1983, and any amendments thereto.

§ 1150.102 Department.

Department means the United States Department of Agriculture.

§ 1150.103 Secretary.

Secretary means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

§ 1150.104 Board.

Board means the National Dairy Promotion and Research Board established pursuant to § 1150.131.

§ 1150.105 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative or other entity.

§ 1150.106 United States.

United States means the 48 contiguous States in the continental United States.

§ 1150.107 Fiscal period.

Fiscal period means the calendar year or such other annual period as the Board may determine.

§ 1150.108 Eligible organization.

Eligible organization means any organization which has been certified by the Secretary pursuant to §§ 1150.270 through 1150.278 of this Part.

§ 1150.109 Qualified State or regional program.

Qualified State or regional program means any State or regional dairy product promotion, research or nutrition education program which is certified as a qualified program pursuant to § 1150.153.

§ 1150.110 Producer.

Producer means any person engaged in the production of milk for commercial use.

§ 1150.111 Milk.

Milk means any class of cow's milk produced in the United States.

§ 1150.112 Dairy products.

Dairy products means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products.

§ 1150.113 Fluid milk products.

Fluid milk products means those milk products normally consumed in liquid form as a beverage.

§ 1150.114 Promotion.

Promotion means actions such as paid advertising, sales promotion, and publicity to advance the image and sales of, and demand for, dairy products generally.

§ 1150.115 Research.

Research means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for dairy products.

§ 1150.116 Nutrition education.

Nutrition education means those activities intended to broaden the understanding of sound nutritional principles, including the role of milk and dairy products in a balanced diet.

§ 1150.117 Plans and projects.

Plans and projects means promotion, research and nutrition education plans, studies or projects pursuant to §§ 1150.139, 1150.140 and 1150.161.

§ 1150.118 Marketing.

Marketing means the sale or other disposition in commerce of dairy products.

§ 1150.119 Cooperative association.

Cooperative association means any cooperative marketing association of producers which is organized under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act".

§ 1150.131 Establishment and membership.

(a) There is hereby established a National Dairy Promotion and Research Board of thirty-six members. For purposes of nominating producers to the Board, the United States shall be divided into thirteen geographic regions and the number of Board members from each region shall be as follows:

(1) Two members from region number one comprised of the following States: Washington and Oregon.

(2) Seven members from region number two comprised of the following State: California.

(3) Three members from region number three comprised of the following States: Arizona, Colorado, Idaho, Montana, Nevada, Utah, and Wyoming.

(4) Three members from region number four comprised of the following States: Arkansas, Kansas, New Mexico, Oklahoma and Texas.

(5) Two members from region number five comprised of the following States: Minnesota, North Dakota and South Dakota.

(6) Five members from region number six comprised of the following State: Wisconsin.

(7) Two members from region number seven comprised of the following States: Illinois, Iowa, Missouri, and Nebraska.

(8) One member from region number eight comprised of the following States: Alabama, Kentucky, Louisiana, Mississippi and Tennessee.

(9) Three members from region number nine comprised of the following States: Indiana, Michigan, Ohio and West Virginia.

(10) One member from region number ten comprised of the following States: Florida, Georgia, North Carolina, South Carolina and Virginia.

(11) Three members from region number eleven comprised of the following States: Delaware, Maryland, New Jersey and Pennsylvania.

(12) Three members from region number twelve comprised of the following State: New York.

(13) One member from region number thirteen comprised of the following States: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

(b) The Board shall be composed of milk producers appointed by the Secretary either from nominations

submitted pursuant to § 1150.133 or in accordance with § 11150.136. A milk producer may be nominated only to represent the region in which such producer's milk is produced.

(c) At least every five years, and not more than every three years, the Board shall review the geographic distribution of milk production volume throughout the United States and, if warranted, shall recommend to the Secretary a reapportionment of regions and/or a modification of the number of members from regions in order to best reflect the geographic distribution of milk production volume in the United States.

(d) The number of members for each region which shall serve on the Board shall be determined by dividing the total pounds of milk produced in the United States for the calendar year previous to the date of review by 36 which provides a factor of pounds of milk per member, and then dividing the total pounds of milk for each region by such factor.

(e) In determining the volume of milk produced in the United States, the Board and the Secretary shall utilize the information received by the Board pursuant to § 1150.171 and data published by the Department.

§ 1150.132 Term of office.

(a) The members of the Board shall serve for terms of three years, except that the members appointed to the initial Board shall serve proportionately, for terms of one, two and three years.

(b) Each member of the Board shall serve until October 31 of the year in which his/her term expires,

except that a retiring member may serve until a successor is appointed.

(c) No member shall serve more than two consecutive terms.

§ 1150.133 Nominations.

Nominations for members of the Board shall be made in the following manner:

(a) Upon effectuation of this provision, the Secretary shall solicit nominations for the initial Board from all eligible organizations. If the Secretary determines that a substantial number of producers are not members of, or their interests are not represented by, such eligible organizations, the Secretary shall also solicit nominations from such producers through general farmer organizations or by other means.

(b) After the appointment of the initial Board, the Secretary shall announce at least 120 days in advance when a Board member's term is expiring and shall solicit nominations for that position in the manner described in paragraph (a) of this section. Nominations for such position should be submitted to the Secretary not less than 60 days prior to the expiration of such term.

(c) An eligible organization may submit nominations only for positions on the Board that represent regions in which such eligible organization can establish that it represents a substantial number of producers. If there is more than one Board position for any such region, the organization may submit nominations for each position.

(d) Where there is more than one eligible organization representing producers in a specific region, they may caucus and jointly nominate producers for each

position representing that region on the Board for which a member is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary nominations for each appointment to be made to represent that region.

§ 1150.134 Nominee's agreement to serve.

Any producer nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

(a) Serve on the Board if appointed;

(b) Disclose any relationship with any organization that operates a qualified State or regional program or has a contractual relationship with the Board; and

(c) Withdraw from participation in deliberations, decision-making, or voting on matters where paragraph (b) applies.

§ 1150.135 Appointment.

From the nominations made pursuant to § 1150.133, the Secretary shall appoint the members of the Board on the basis of representation provided for in § 1150.131(a).

§ 1150.136 Vacancies.

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall appoint a successor from the most recent list of nominations for the position or from nominations made by the Board.

§ 1150.137 Procedure.

(a) A majority of the members shall constitute a quorum at a properly convened meeting of the Board. Any action of the Board shall require the concurring votes of at least a majority of those present and voting. The Board shall establish rules concerning timely notice of meetings.

(b) The Board may take action upon the concurring votes of a majority of its members by mail, telephone, or telegraph when in the opinion of the chairman of the Board such action must be taken before a meeting can be called. Action taken by this emergency procedure is valid only if all members are notified and provided the opportunity to vote and any telephone vote is confirmed promptly in writing. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board.

§ 1150.138 Compensation and reimbursement.

The members of the Board shall serve without compensation but shall be reimbursed for necessary and reasonable expenses, including a per diem allowance as recommended by the Board and approved by the Secretary, incurred by them in the performance of their duties under this subpart.

§ 1150.139 Powers of the Board.

The Board shall have the following powers:

(a) To receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to

make recommendations to the Secretary regarding such proposals;

(b) To administer the provisions of this subpart in accordance with its terms and provisions;

(c) To make rules and regulations to effectuate the terms and provisions of this subpart;

(d) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this subpart;

(e) To disseminate information to producers or eligible organizations through programs or by direct contact utilizing the public postage system or other systems;

(f) To select committees and subcommittees of Board members, and to adopt such rules for the conduct of its business as it may deem advisable;

(g) To establish advisory committees of persons other than Board members and pay the necessary and reasonable expenses and fees of the members of such committees;

(h) To recommend to the Secretary amendments to this subpart; and

(i) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds collected through assessments authorized under § 1150.152 in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

§ 1150.140 Duties of the Board.

The Board shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairman and such other officers as may be necessary;

(b) To appoint from its members an executive committee whose membership shall equally reflect each of the different regions in the United States in which milk is produced, and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board;

(c) To appoint or employ such persons as it may deem necessary and define the duties and determine the compensation of each;

(d) To review all programs that promote milk and dairy products on a brand or trade name basis that have requested certification pursuant to § 1150.153, and to recommend to the Secretary whether such request should be granted;

(e) To develop and submit to the Secretary for approval, promotion, research, and nutrition education plans or projects resulting from research or studies conducted either by the Board or others;

(f) To solicit, among other proposals, research proposals that would increase the use of fluid milk and dairy products by the military and by persons in developing nations, and that would demonstrate the feasibility of converting surplus nonfat dry milk to casein for domestic and export use;

(g) To prepare and submit to the Secretary for approval, budgets on a fiscal period basis of its antici-

pated expenses and disbursements in the administration of this subpart, including probable costs of promotion, research and nutrition education plans or projects, and also including a general description of the proposed promotion, research and nutrition education programs contemplated therein;

(h) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and prepare and submit such reports from time to time to the Secretary as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(i) With the approval of the Secretary, to enter into contracts or agreements with national, regional or State dairy promotion and research organizations or other organizations or entities for the development and conduct of activities authorized under §§ 1150.139 and 1150.161, and for the payment of the cost thereof with funds collected through assessments pursuant to § 1150.152. Any such contact or agreement shall provide that

(1) The contractors shall develop and submit to the Board a plan or project together with a budget or budgets which shall show the estimated cost to be incurred for such plan or project;

(2) Any such plan or project shall become effective upon approval of the Secretary; and

(3) The contracting party shall keep accurate records of all of its transactions and make periodic reports to the Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may

require. The Secretary or employees of the Board may audit periodically the records of the contracting party;

(j) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended;

(k) To have an audit of its financial statements conducted by a certified public accountant in accordance with generally accepted auditing standards, at least once each fiscal period and at such other times as the Secretary may request, and to submit a copy of each such audit report to the Secretary;

(l) To give the Secretary the same notice of meetings of the Board, committees of the Board and advisory committees as is given to such Board or committee members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(m) To submit to the Secretary such information pursuant to this subpart as may be requested; and

(n) To encourage the coordination of programs of promotion, research and nutrition education designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States.

§ 1150.151 Expenses.

(a) The Board is authorized to incur such expenses (including provision for a reasonable reserve) as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and perform its duties

in accordance with the provisions of this subpart. However, after the first full year of operation of the order, administrative expenses incurred by the Board shall not exceed 5 percent of the projected revenue of that fiscal year. Such expenses shall be paid from assessments collected pursuant to § 1150.152.

(b) The Board shall reimburse the Secretary, from assessments collected pursuant to § 1150.152, for administrative costs incurred by the Department after May 1, 1984.

§ 1150.152 Assessments.

(a) Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment on all such milk handled for the account of the producer at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof and shall remit the assessment to the Board.

(b) Any producer marketing milk of that producer's own production in the form of milk or dairy products to consumers, either directly or through retail or wholesale outlets, shall remit to the Board an assessment on such milk at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof.

(c) In determining the assessment due from each producer pursuant to § 1150.152(a) and (b), a producer who is participating in a qualified State or regional program(s) shall receive a credit for contributions to such program(s), but not to exceed the following amounts:

(1) In the case of contributions for milk marketed on or before May 31, 1984, up to the actual rate of contribution that was in effect under such program(s) on

November 29, 1983, not to exceed 15 cents per hundredweight of milk marketed.

(2) In all other cases, the credit shall not exceed 10 cents per hundredweight of milk marketed.

(d) In order for a producer described in § 1150.152(a) to receive the credit authorized in § 1150.152(c), either the producer or a cooperative association on behalf of the producer must establish to the person responsible for remitting the assessment to the Board that the producer is contributing to a qualified State or regional program. Producers who contribute to a qualified program directly (other than through a payroll deduction) must establish with the person responsible for remitting the assessment to the Board, with validation by the qualified program, that they are making such contributions.

(e) In order for a producer described in § 1150.152(b) to receive the credit authorized in § 1150.152(c), the producer and the applicable qualified State or regional program must establish to the Board that the producer is contributing to a qualified State or regional program.

(f) The collection of assessments pursuant to § 1150.152(a) and (b) shall begin with respect to milk marketed on and after the effective date of this section and shall continue until terminated by the Secretary. If the Board is not constituted by the date the first assessments are to be collected, the Secretary shall have the authority to receive the assessments on behalf of the Board. The Secretary shall remit such assessments to the Board when it is constituted.

(g) Each person responsible for the remittance of the assessment pursuant to § 1150.152(a) and (b) shall

remit the assessment to the Board not later than the last day of the month following the month in which the milk was marketed.

(h) Money remitted to the Board shall be in the form of a negotiable instrument made payable to "National Dairy Promotion and Research Board." Remittances and reports specified in § 1150.171 shall be mailed to the location designated by the Secretary or the Board.

§ 1150.153 Qualified State or regional dairy product promotion, research or nutrition education programs.

(a) Any organization which conducts a State or regional dairy product promotion, research or nutrition education program may apply to the Secretary for certification of qualification so that producers may receive credit pursuant to § 1150.152(c) for contributions to such program.

(b) In order to be certified by the Secretary as a qualified program, the program must:

(1) Conduct activities as defined in §§ 1150.114, 1150.115, and 1150.116 that are intended to increase consumption of milk and dairy products generally;

(2) Except for programs operated under the laws of the United States or any State, have been active and ongoing before enactment of the Act;

(3) Be financed primarily by producers, either individually or through cooperative associations;

(4) Not use a private brand or trade name in its advertising and promotion of dairy products unless the Board recommends and the Secretary concurs that such preclusion should not apply;

(5) Certify to the Secretary that any requests from producers for refunds under the program will be honored by forwarding to either the Board or a qualified State or regional program designated by the producer that portion of such refunds equal to the amount of credit that otherwise would be applicable to that program pursuant to § 1150.152(c); and

(6) Not use program funds for the purpose of influencing governmental policy or action.

(c) An application for certification of qualifications of any State or regional dairy product promotion, research or nutrition education program which does not satisfy the requirements specified in paragraph (b) of this section shall be denied. The certification of any qualified program which fails to satisfy the requirements specified in paragraph (b) of this section after certification shall be subject to suspension or termination.

(1) Prior to the denial of an application for certification of qualification, or the suspension or termination of an existing certification, the Director of the Dairy Division shall afford the applicant or the holder of an existing certification an opportunity to achieve compliance with the requirements for certification within a reasonable time, as determined by the Director.

(2) Any State or regional dairy product promotion, research or nutrition education program whose application for certification of qualification is to be denied, or whose certification of qualification is to be suspended or terminated shall be given written notice of such pending action and shall be afforded an opportunity to petition the Secretary for a review of the action. The petition shall be in writing and shall state the facts

relevant to the matter for which the review is sought, and whether petitioner desires an informal hearing. If an informal hearing is not requested, the Director of the Dairy Division shall issue a final decision setting forth the action to be taken and the basis for such action. If petitioner requests a hearing, the Director of the Dairy Division, or a person designated by the Director, shall hold an informal hearing in the following manner:

(i) Notice of a hearing shall be given in writing and shall be mailed to the last known address of the petitioner or of the State or regional program, or to an officer thereof, at least 20 days before the date set for the hearing. Such notice shall contain the time and place of the hearing and may contain a statement of the reason for calling the hearing and the nature of the questions upon which evidence is desired or upon which argument may be presented. The hearing place shall be as convenient to the State or regional program as can reasonably be arranged.

(ii) Hearings are not to be public and are to be attended only by representatives of the petitioner or the State or regional program and of the U.S. Government, and such other parties as either the State or regional program or the U.S. Government desires to have appear for purposes of submitting information or as counsel.

(iii) The Director of the Dairy Division, or a person designated by the Director, shall be the presiding officer at the hearing. The hearing shall be conducted in such manner as will be most conducive to the proper disposition of the matter. Written statements or briefs may be filed by the petitioner or the State or regional program, or other participating parties, within the time specified by the presiding officer.

(iv) The presiding officer shall prepare preliminary findings setting forth a recommendation as to what action should be taken and the basis for such action. A copy of such findings shall be served upon the petitioner or the State or regional program by mail or in person. Written exceptions to the findings may be filed within 10 days after service thereof.

(v) After due consideration of all the facts and the exceptions, if any, the Director of the Dairy Division shall issue a final decision setting forth the action to be taken and the basis for such action.

§ 1150.154 Influencing governmental action.

No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this subpart.

§ 1150.155 Adjustment of accounts.

Whenever the Board or the Department determines through an audit of a person's reports, records, books or accounts or through some other means that additional money is due the Board or that money is due such person from the Board, such person shall be notified of the amount due. The person shall then remit any amount due the Board by the next date for remitting assessments as provided in § 1150.152. Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months.

§ 1150.156 Charges and penalties.

(a) Late-payment charge. Any unpaid assessments to the Board pursuant to § 1150.152 shall be increased 1.5 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purpose of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board, whichever is earlier.

(b) Penalties. Any person who willfully violates any provision of this subpart shall be assessed a civil penalty by the Secretary of not more than $1,000 for each such violation and, in the case of a willful failure to pay, collect, or remit the assessment as required by this subpart, in addition to the amount due, a penalty equal to the amount of the assessment on the quantity of milk as to which the failure applies. The amount of any such penalty shall accrue to the United States and may be recovered in a civil suit brought by the United States. The remedies provided in this section shall be in addition to, and not exclusive of, other remedies that may be available by law or in equity.

§ 1150.161 Promotion, research and nutrition education.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any plans or projects authorized in §§ 1150.139, 1150.140 and this section. Such plans or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate plans or projects for promotion, research and nutrition education with respect to milk and dairy products; and

(2) The establishment and conduct of research and studies with respect to the sale, distribution, marketing and utilization of milk and dairy products and the creation of new products thereof, to the end that marketing and utilization of milk and dairy products may be encouraged, expanded, improved or made more acceptable. Included shall be research and studies of proposals intended to increase the use of fluid milk and dairy products by the military and by persons in developing nations and proposals intended to demonstrate the feasibility of converting nonfat dry milk to casein for domestic and export use.

(b) Each plan or project authorized under § 1150.161(a) shall be periodically reviewed or evaluated by the Board to insure that the plan or project contributes to an effective program of promotion, research and nutrition education. If it is found by the Board that any such plan or project does not further the purposes of the Act, the Board shall terminate such plan or project.

(c) No plan or project authorized under § 1150.161(a) shall make use of unfair or deceptive acts

or practices with respect to the quality, value or use of any competing product.

§ 1150.171 Reports.

Each producer marketing milk of that producer's own production directly to consumers and each person making payment to producers and responsible for the collection of the assessment under § 1150.152 shall be required to report at the time for remitting assessments to the Board such information as may be required by the Board or by the Secretary. Such information may include but not be limited to the following:

(a) The quantity of milk purchased, initially transferred or which, in any other manner, are subject to the collection of the assessment;

(b) The amount of assessment remitted;

(c) The basis, if necessary, to show why the remittance is less than the number of hundredweights of milk multiplied by 15 cents; and

(d) The date any assessment was paid.

§ 1150.172 Books and records.

Each person who is subject to this subpart, and other persons subject to § 1150.171, shall maintain and make available for inspection by employees of the Board and the Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued hereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

§ 1150.173 Confidential treatment.

All information obtained from such books, records or reports under the Act and this subpart shall be kept confidential by all persons, including employees and former employees of the Board, all officers and employees and all former officers and employees of the Department, and by all officers and all employees and all former officers and employees of contracting agencies having access to such information, and shall not be available to Board members. Only those persons having a specific need for such information in order to effectively administer the provisions of this subpart shall have access to such information. In addition, only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the discretion, or upon the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of the subpart violated by such person.

§ 1150.181 Proceedings after termination.

(a) Upon the termination of this subpart, the Board shall recommend not more than five of its members to

the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all the funds and property owned, in the possession of, or under the control of the Board, including unpaid claims or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contract or agreements entered into by it pursuant to § 1150.140(i);

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligation imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the promotion,

research or nutrition education plans or projects authorized pursuant to this subpart.

§ 1150.182 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant hereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may hereafter arise in connection with any provision of this subpart or any regulation issued thereunder;

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder; or

(c) Affect or impair any rights or remedies of the United States, or of the Secretary, or of any person, with respect to any such violation.

§ 1150.183 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly, in any way whatsoever to any person for errors in judgment, mistakes, or other acts of either commission or omission of such member or employee, except for acts of dishonesty or willful misconduct.

§ 1150.184 Patents, copyrights, inventions and publications.

Any patents, copyrights, trademarks, inventions or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties,

residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications, inure to the benefit of the Board. Upon termination of this subpart, § 1150.181 shall apply to determine disposition of all such property.

§ 1150.185 Amendments.

The Secretary may from time to time amend provisions of this part. Any interested person or organization affected by the provisions of the Act may propose such amendments to the Secretary.

§ 1150.186 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

§ 1150.187 Paperwork Reduction Act assigned number.

The information collection and recordkeeping requirements contained in §§ 1150.133, 1150.152, 1150.153, 1150.171, 1150.172, 1150.202, 1150.204, 1150.205, 1150.211 and 1150.273 of these regulations (7 CFR Part 1150) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0581-0147.

§ 1150.270 General.

Organizations must be certified by the Secretary that they are eligible to represent milk producers and to

participate in the making of nominations of milk producers to serve as members of the National Dairy Promotion and Research Board as provided in the Dairy and Tobacco Adjustment Act of 1983. Certifications of eligibility required of the Secretary shall be conducted in accordance with this subpart.

§ 1150.271 Definitions.

As used in this subpart:

(a) Act means Title I, Subtitle B, of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, as approved November 29, 1983, and any amendments thereto;

(b) Department means the United States Department of Agriculture;

(c) Secretary means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated to act in the Secretary's stead;

(d) Dairy Division means the Dairy Division of the Department's Agricultural Marketing Service;

(e) Producer means any person engaged in the production of milk for commercial use;

(f) Dairy products means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products; and

(g) Fluid milk products means those milk products normally consumed in liquid form as a beverage.

§ 1150.272 Responsibility for administration of regulations.

The Dairy Division shall have the responsibility for administering the provisions of this subpart.

§ 1150.273 Application for certification.

Any organization whose membership consists primarily of milk producers may apply for certification. Applicant organizations should supply information for certification using as a guide "Application for Certification of Organizations," Form DA-26. Form DA-26 may be obtained from the Dairy Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, DC 20250.

§ 1150.274 Certification standards.

(a) Certification of eligible organizations shall be based, in addition to other available information, on a factual report submitted by the organization, which shall contain information deemed relevant and specified by the Secretary for the making of such determination, including the following:

(1) Geographic territory covered by the organization's active membership;

(2) Nature and size of the organization's active membership including the total number of active milk producers represented by the organization;

(3) Evidence of stability and permanency of the organization;

(4) Sources from which the organization's operating funds are derived;

(5) Functions of the organization; and

(6) The organization's ability and willingness to further the aims and objectives of the Act.

(b) The primary considerations in determining the eligibility of an organization shall be whether its membership consists primarily of milk producers who produce a substantial volume of milk, and whether the primary or overriding interest of the organization is in the production or processing of fluid milk and dairy products and promotion of the nutritional attributes of fluid milk and dairy products.

(c) The Secretary shall certify any organization which he finds meets the criteria under this section and his determination as to eligibility shall be final.

§ 1150.275 Inspection and investigation.

The Secretary shall have the right, at any time after an application is received from an organization, to examine such books, documents, papers, records, files, and facilities of an organization as he deems necessary to verify the information submitted and to procure such other information as may be required to determine whether the organization is eligible for certification.

§ 1150.276 Review of certification.

Certifications issued pursuant to this subpart are subject to termination or suspension if the organization does not currently meet the certification standards. A certified organization may be requested at any time to supply the Dairy Division with such information as may be required to show that the organization continues to be eligible for certification. Any information submitted to satisfy a request pursuant to this section shall be subject to inspection and investigation as provided in § 1150.275.

§ 1150.277 Listing of certified organizations.

A copy of each certification shall be furnished by the Dairy Division to the respective organization. Copies also shall be filed in the Dairy Division where they will be available for public inspection.

§ 1150.278 Confidential treatment.

All documents and other information submitted by applicant organizations and otherwise obtained by the Department by investigation or examination of books, documents, papers, records, files, or facilities shall be kept confidential by all employees of the Department. Only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in the issuance of general statements based upon the applications of a number of persons, which do not identify the information furnished by any one person.